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CASES DETERMINED
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JUDGES
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SUPREME COURT OF WASHINGTON

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ERRATA

Page 114, 2d syllabus, line 2, for to read by
Page 172, line 12 from bottom, for 1227 read 227
Page 234, 1st syllabus, line 2 from bottom, for or the other, read
on the other

CASES
DETERMINED IN THE
SUPREME COURT
OF
WASHINGTON

[No. 14662. Department One. April 3, 1918.]

THE STATE OF WASHINGTON, *on the Relation of Ina Hoffman Snook, Plaintiff*, v. JOHN S. JUREY, *Judge etc., Respondent.*¹

APPEAL—RECORD—STATEMENT OF FACTS—CERTIFICATION—ALL THE MATERIAL FACTS. A judge cannot be compelled to certify a statement of facts as containing all the material facts, when such is not the case, although no amendments were proposed, under Rem. Code, § 389, providing that if no amendments are proposed the statement shall be deemed agreed to; in view of Id., § 391, requiring the judge to certify that a statement contains all the material facts "when such is the fact."

SAME—STATEMENT OF FACTS—SUFFICIENCY—RIGHT TO AMEND. The trial judge is not justified in striking out, in effect, a proposed statement of facts by refusing to certify it without allowing an opportunity for amendment, where it was not made in bad faith and included considerable detail covering 70 typewritten pages, although it did not contain all the evidence material to the issue involved in the appeal.

Application filed in the supreme court January 29, 1918, for a writ of mandamus to compel the superior court for King county, Jurey, J., to certify a statement of facts. Denied.

Tucker & Hyland and *Herbert E. Snook*, for relator.

Roy E. Campbell and *Donworth & Todd*, for respondent.

¹Reported in 171 Pac. 1014.

PARKER, J.—The relator, Ina Hoffman Snook, seeks an order and mandate from this court requiring the defendant, John S. Jurey, as judge of the superior court of King county, to certify a statement of facts as proposed by her in an action tried and prosecuted to final judgment upon the merits in that court, Judge Jurey presiding, from which judgment she has appealed to this court.

The action in which the relator seeks to have settled and certified the statement of facts in question was commenced and prosecuted in the superior court for King county by her, as plaintiff, against H. B. Kennedy and eight others, including Carl J. Smith, as defendants. The main purpose on the part of relator in prosecuting that action does not appear in the record before us. It appears, however, that there was in some manner incidentally involved therein the question of the amount of compensation Carl J. Smith was entitled to for services rendered by him as attorney for the relator, as executrix of the last will and testament of Josephine E. Kennedy, deceased. On August 1, 1917, a judgment for such services was rendered in that action in favor of Carl J. Smith and against Ina Hoffman Snook, as executrix of the last will and testament of Josephine Kennedy, deceased, and against the estate of Josephine Kennedy, in the sum of \$6,000. She appealed from that judgment to this court, and thereafter caused to be prepared, filed and served upon Carl J. Smith and the other defendants in that action her proposed statement of facts. This statement was proposed as a statement of all the material facts occurring in the cause relating to the question of attorney's fees claimed by Carl J. Smith, as was evidenced by the proposed certificate attached thereto to be signed by the judge, reading in part as follows:

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"I do further certify that said statement of facts contains all of the material facts, matters and proceedings heretofore occurring in said cause in the matter of attorney fees and not already a part of the record herein; and that the same contains all the facts, matters and proceedings, and all the evidence and testimony introduced upon the trial of said cause in the matter of attorney fees."

Thereafter, within the ten days prescribed by Rem. Code, § 389, for proposing amendments to proposed statements of fact, Smith moved the court to compel appellant, this relator, to file a complete statement of facts, or in the alternative, to strike her proposed statement of facts, and also objected to the signing of the statement of facts as proposed; that is, objected to its being signed as a statement of all the facts. This motion and objection was based upon the ground that the proposed statement did not contain all of the facts occurring in the cause relating to the matter of the attorney's fees in question. The judge denied the motion, both as to compelling her to prepare a more complete statement and as to striking the proposed statement, but he did not then sign the proposed statement as either a partial or full statement of the facts. Thereafter relator caused to be served upon Smith a notice that she would apply to the judge to certify the statement as proposed by her. The matter came on to be heard, when Smith renewed his objection to the signing of the statement as proposed, upon the ground that it did not contain all of the facts occurring in the cause relating to the matter of the attorney's fees in question. The judge, in effect, sustained this motion, refusing to certify the statement as proposed, but did sign a certificate thereto reading as follows:

"I, John S. Jurey, one of the judges of the above entitled court, sitting in Department No. 5 thereof, and the judge before whom the above entitled cause

was tried, do hereby certify that the matters and proceedings contained in the foregoing statement of facts are matters and proceedings occurring in said cause and the same are hereby made a part of the record herein.

“Done in open court, counsel for plaintiff and defendant being present, and counsel for plaintiff objecting to the form of this certificate, this 25th day of January, 1918. Exception allowed to plaintiff.

“John S. Jurey, Judge.”

A copy of the proposed statement as certified by the judge is before us attached to the application for the writ in this proceeding. It contains seventy ordinary pages of typewriting, and it appears upon its face to cover in considerable detail and quite fully the question of attorney's fees for services rendered by Smith to the estate of Josephine E. Kennedy and relator as executrix thereof, though we cannot tell from the face of the statement just how far it may be deficient as a statement of all the facts occurring in the cause relating to that question. In his return and answer in this proceeding, the judge states in part as follows:

“That the said proposed statement of facts, as on file and of record in said cause, a copy of which is attached to the application for the alternative writ of mandate herein, does not contain all of the material facts, matters and proceedings heretofore occurring in said cause, but contains only a part of the material facts, matters and proceedings occurring therein respecting the attorney's fees of the said Carl J. Smith as aforesaid.

“That, at the trial of said cause, the said Carl J. Smith, H. B. Kennedy, and P. S. Norton, testified at great length concerning the actual services performed by the said Carl J. Smith as attorney for the executrix of the estate of Josephine E. Kennedy, deceased, and for the estate of Josephine E. Kennedy, which testimony was relevant and material upon the issue of the amount of attorney's fees which should be allowed the

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said Carl J. Smith for the services aforesaid; that the evidence given by the above mentioned witnesses is not contained in the proposed statement of facts on file and of record in said cause, nor is it any part of the record therein; that to require affiant to certify that the said proposed statement of facts on file in said cause contains all of the material facts, matters and proceedings heretofore occurring in said cause in the matter of said attorney's fees and not already a part of the record herein, and all the evidence and testimony introduced upon the trial of said cause in the matter of said attorney's fees, would be requiring affiant as a judge of the superior court of King county to certify to something affiant and said court knows not to be true, but false and misleading.

"Furthermore, affiant states that, at the trial of said cause, as is shown by the agreement of counsel made in open court and as set forth on pages 8 and 9 of the proposed statement of facts, all of the testimony in the above entitled cause was to be considered by the court in fixing and determining the value of the services or amount of the attorney's fees of the said respondent, Carl J. Smith; that all of the testimony as aforesaid was thereby made relevant and material thereto."

There is nothing in the record before us indicating that, at or prior to the signing of the statement as above indicated, counsel for relator was by the judge given any opportunity to furnish such additions thereto as would make it a statement of all the facts occurring in the cause relating to the attorney's fees in question. We think we may assume from the record and the statements of counsel at the hearing in this court that no such opportunity was by the judge given to counsel for relator.

The first question for our consideration is, Was it the duty of the judge to certify the statement as proposed; that is, to certify it as a statement of all of the facts occurring in the cause relating to the attorney's

fees in question, in face of the objections of counsel for Smith, in whose favor the judgment was rendered, notwithstanding no amendments were proposed in his behalf? As at present advised, we think we are compelled to proceed upon the theory that the statement as proposed did not contain all the facts occurring in the cause relating to the attorney's fees in question. Counsel for relator contend, however, that such fact is of no controlling force here, since no amendments were proposed in behalf of Smith, and that, therefore, the statement as proposed became in effect an agreed statement of all the facts occurring in the cause relating to the attorney's fees in question.

Section 389, Rem. Code, does seem to make a statement of facts to which no amendments are proposed an agreed statement of facts, and seems to contemplate that the trial judge shall certify it as such, and this, we think, is ordinarily the case. But we do not think this means that a trial judge is legally bound to certify a proposed statement of facts as containing all of the facts occurring in the cause not already a part of the record therein, when he knows that such is not the fact, and the opponent of the party proposing such statement objects to its being so certified. In Rem. Code, § 391, we read:

"The judge shall certify that the matters and proceedings embodied in the bill or statement, as the case may be, are matters and proceedings occurring in the cause and that the same are thereby made a part of the record therein; and, *when such is the fact*, he shall further certify that the same contains all the material facts, matters and proceedings heretofore occurring in the cause and not already a part of the record therein, or (as the case may be) such thereof as the parties have agreed, to be all that are material therein."

We italicize the words of this section to be particularly noticed. This language negatives the idea that

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the mere failure to propose amendments compels the certifying of a statement of facts as containing all of the facts, when objections to so certifying it are made by the opponent of the one proposing it, though he may offer no amendments, and the trial judge knows that it does not contain all the facts. Plainly a statement of facts proposed by a party as containing all the facts, which is objected to by the opposing party upon the ground that it does not contain all the facts, is not an agreed statement of all the facts.

In *State ex rel. Smith v. Parker*, 9 Wash. 653, 38 Pac. 156, there was involved a situation somewhat like that here involved: a statement of facts was proposed by a party, to which statement amendments were proposed by his opponent and which amendments were accepted by the proposing party. This, under Rem. Code, § 389, which was then the law (Laws 1893, p. 114), apparently made it an agreed statement of facts. Counsel for the proposing party insisted that the judge should then certify the statement as containing all the facts occurring in the cause not already a part of the record therein. This was objected to by counsel for the opposing party, though no objection was offered to the certifying of the statement as containing matters "occurring in the cause." This the judge offered to do, refusing to certify that the statement contained all the facts. It was sought by mandamus in this court to compel the judge to certify the proposed statement of facts as containing all the facts. In denying the writ and disposing of the application therefor, Judge Stiles, speaking for the court, said:

"Section 11 of chap. 60, Laws 1893, p. 115, is appealed to by the relators as sustaining their contention that when a statement has been proposed, and amendments are made and accepted, the engrossed statement and amendments are to be taken as an agreed state-

ment of all the material facts, and must be so certified by the judge. But the error of this construction is apparent from the present case. The statute does not contemplate that a trial judge shall be called upon to certify to this court as true what he knows to be not true."

There have been some decisions rendered since then which may seem to hold that it is the legal duty of a trial judge to certify a statement of facts which has been agreed upon by counsel for all parties, according as it is agreed to be a partial or a full statement, whether such agreement is an express one or one arising from implication of law upon a failure to propose amendments, upon an acceptance of proposed amendments, or upon a failure to object to certifying of such statement as containing all the facts. But this court has never receded from the holding above quoted from in *State ex rel. Smith v. Parker*, to the extent of even suggesting that it is the legal duty of a trial judge to certify to a statement of facts as containing all the facts, over the objections of the opponent of the one proposing the statement, when the trial judge knows that that statement sought to be so certified does not in fact contain all the facts occurring in the cause and not already a part of the record therein. We cannot say that Judge Jurey failed in his legal duty when he refused to certify the statement of facts as proposed; that is, as containing all the facts occurring in the cause relating to the attorney's fees of Carl J. Smith in question.

What we have said so far might seem to call for our denial of the writ and order prayed for by relator and the giving of no further consideration to her rights in the premises. However, since this is an original proceeding in this court and is invoked in aid of our appellate jurisdiction, we think we are not confined to the

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mere question of compelling the certifying of the statement of facts as proposed, but that it is our duty to grant relator such relief as the facts presented entitle her to, looking to the fair presentation of her appeal in this court. Counsel for relator express a willingness to supply any deficiency in the statement of facts proposed by her, in order to make it a statement of all the facts, if it be held not to contain all the facts in its present condition.

Now, unless it clearly appears that counsel for relator proposed and sought the certifying of the statement of facts as containing all the facts relating to the attorney's fees in question in bad faith and in an attempt to cast upon Smith, the judgment creditor, the burden of supplying a statement of some considerable portion of the facts relating to his attorney's fees in order to make it a statement of all the facts, we think the judge should not have limited his decision to the bare question of whether or not the statement as proposed contained all the facts, but, having concluded that the statement did not contain all the facts, should have given relator opportunity to supply such deficiencies, with directions as to what should be so supplied; and not until after reasonable opportunity and neglect on the part of the relator to so supply such deficiencies should a certificate as asked for by her have been finally denied. It appears here that a statement of all the facts occurring in the cause relating to the attorney's fees in question is necessary to review the judgment appealed from in the manner relator desires to have that judgment reviewed. So, when a certificate to that effect was finally denied by the judge, such denial was in effect the striking of the statement of facts as proposed, in so far as its benefit to her upon appeal is concerned. We adhere to the rule that a party proposing a statement of facts cannot cast upon his op-

ponent the burden of furnishing any considerable portion of a statement through proposed amendments; but that does not mean that, simply because a proposed statement of all the facts does not contain all the facts, it shall be cast aside by the trial judge and a certificate thereto, as such, finally refused without giving an opportunity to the one proposing it to supply such deficiencies as the judge may deem necessary to render it such that he can truthfully certify to it as containing all the facts. In *State ex rel. Fowler v. Steiner*, 51 Wash. 239, 98 Pac. 609, Judge Fullerton, speaking for the court, made the following pertinent observations touching this question:

“The procedure herein provided for, it will be noticed, does not contemplate the practice of moving to strike the statement of facts merely because it does not conform to what the adverse party may deem a proper or correct statement. The remedy the statute gives him is the right to propose such amendments as will make the statement a proper and correct statement of the facts of the case, and in all ordinary cases this is the adverse party’s sole remedy for a defective or imperfect statement. But it is equally plain that it was not the purpose of the statute to require the adverse party to furnish the entire or any considerable portion of the statement, and the appellant should not be permitted to compel him to do this either designedly, or by omissions made through inadvertence. If, therefore, there is a serious omission in the proposed statement, or if the proposed statement is not in a form the court may deem proper, the party proposing it should himself be required to supply the defect. But the proper practice to accomplish this end is not to strike the proposed statement. Such a practice will in most cases deprive the party of his right to perfect his appeal, and consequently deprive him of a substantial part of that remedial justice guaranteed by the constitution and laws of the state. The better practice is to give the party an opportunity to correct the defects

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and supply the omissions pointed out, and strike the statement only when he refuses to comply with the court's order. The statement should be stricken in the first instance only where it is manifest that the party proposing it has been guilty of bad faith or such gross negligence as will amount to bad faith; the remedy should not be invoked where there has been an attempt in good faith to comply with the statute."

We note from statements made in the judge's return in this proceeding that he expressed the opinion that counsel for relator, in furnishing the statement of facts, did not propose it as a statement in good faith of all the facts relating to the attorney's fees in question. If we have correctly gathered the view of the trial judge upon the question of good faith, we conclude that we cannot concur in his view upon that question in the light of the record before us. The question of attorney's fees, for which judgment was rendered in favor of Smith, seems not to have been the main issue in the case upon trial, and it seems to us that we have in this record enough facts to warrant us in concluding that there was reasonable ground for difference of opinion as to how much of the facts occurring upon the trial of that case related to the question of the attorney's fees, for which judgment was rendered in Smith's favor. We may adopt the trial judge's view that the statement of facts as proposed by relator did not contain all of the facts relating to that question, yet we do not think that the statement as proposed was so far deficient that the trial judge was warranted in treating it as a statement proposed in bad faith with an intent to cast upon Smith the burden of supplying the deficiencies through amendments. This being true, we think that the trial judge should not have finally determined that the statement of facts as proposed should be cast aside entirely as a proposed statement of all of the facts, but that he should have given

the relator an opportunity to supply such deficiencies as would make it a statement of all the facts such as the judge could truthfully certify to be such.

While we deny a peremptory writ requiring the judge to certify the statement of facts as proposed in its present condition, we direct that the judge now furnish to relator a reasonable opportunity and time to prepare such additions to the statement as will make a statement of all the facts occurring in the cause relating to the attorney's fees in question not already a part of the record therein, and that the judge designate in a general way the particulars wherein the statement as proposed is deficient, to the end that counsel for relator may know what is required in that behalf.

ELLIS, C. J., FULLERTON, WEBSTER, and MAIN, JJ., concur.

[No. 14463. Department One. April 3, 1918.]

MATT MATSON, *Appellant*, v. KENNECOTT MINES
COMPANY *et al.*, *Respondents*.¹

APPEARANCE—GENERAL OR SPECIAL—ANSWER TO MERITS. An answer on the merits praying for a dismissal and costs, is general, although it attempted to preserve a special appearance made on motion to quash service of process after overruling the motion; in view of Rem. Code, § 241, providing that every appearance is a general appearance, unless the defendant in making the same states that the same is a special appearance.

CORPORATIONS—ACTIONS AGAINST AFTER DISSOLUTION—STATUTES. Under § 90 of the general corporation law of Nevada, continuing the life of dissolved corporations for one year for the purpose of winding up pending litigation, an action commenced against a dissolved corporation of Nevada will not be dismissed where it made its general appearance in the action within the year limited.

CORPORATIONS—FOREIGN CORPORATIONS—DISSOLUTION—WHAT LAW GOVERNS. The laws of the state of creation govern the existence and dissolution of corporations and will be given extra-territorial effect and recognition.

¹Reported in 171 Pac. 1040.

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ACTIONS — JOINDER — PARTIES — BRINGING IN NEW PARTIES. In an action for personal injuries against a corporation, it is proper to refuse to bring into the case a third person and another corporation for the purpose of obtaining an accounting from them for property of the corporation appropriated by them, since the same was not a proper subject of litigation in such action.

JUDGMENT—DEFAULT—FAILURE TO ANSWER AMENDMENT. The denial of a motion for default in answering a third amended complaint is proper where it was the same as the second amended complaint which defendant had already answered.

STATUTES—FOREIGN LAWS—PLEADING. The pleading of § 90 of the general corporation act of Nevada was not necessary for its introduction in evidence to negative the effect of § 89 of the act, set up by the defendant to show the dissolution of the corporation before suit.

Appeal from orders of the superior court for King county, Jurey, J., entered June 2, 1917, dismissing an action for personal injuries and denying a new trial, after a hearing before the court. Affirmed as to one defendant; reversed as to the other.

George H. Rummens, Wilmon Tucker, Heber McHugh, and John T. Casey, for appellant.

Roberts, Wilson & Skeel and Bogle, Graves, Merritt & Bogle, for respondents.

PARKER, J.—This action was originally commenced in the superior court for King county against the defendant Kennecott Mines Company, a Nevada corporation, by the plaintiff Matson, seeking recovery of damages for personal injuries which he claims to have suffered as the result of the negligence of that company while working at its mines in Alaska in January, 1915. Thereafter Matson filed his third amended complaint, attempting to make Birch a party defendant to the action, which complaint was served upon Birch together with a summons. The case is in this court upon an appeal by Matson from orders of the superior court

dismissing the case as to both defendants and denying him a trial upon the merits.

The dismissal of the case as to the company was, by the trial court, rested upon the ground that it had been disincorporated before the commencement of the action. While counsel seek to sustain the order of dismissal upon that ground, they also seek to sustain the order upon the ground that the superior court never, in any event, acquired jurisdiction over the person of the company, either by an effective service of summons upon it in this state, or by its general appearance in the action. The dismissal as to the defendant Birch was, by the trial court, rested upon the ground that no cause of action was stated against him in the third amended complaint which could be a proper subject of litigation in this case.

On June 1, 1915, Matson signed and verified his original complaint in this action. Thereafter that complaint, together with the summons in usual form, was served upon four different persons in this state, at different times, as resident agents of the company, who were claimed by Matson to be agents of the company upon whom service might be effectually made for it at the time each service was so made. Thereafter counsel for the company appeared specially and made motions to quash the service of the summons upon each of these persons as service upon the company, which motions were rested upon the ground that neither of the persons so attempted to be served was an officer, agent, or representative of the company in this state. We do not find, in either of these motions or elsewhere in this record, any claim that the Kennecott Mines Company was not doing business in this state of such nature and extent that it was subject to be sued therein upon a cause of action such as Matson set forth in his several complaints, apart from the

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claim that it had been disincorporated. These motions to quash were brought on for hearing before the court, when, after hearing evidence and argument of counsel, they were by the court denied. Thereafter the company, by its counsel, answered Matson's complaint upon the merits, denying that its negligence resulted in, or contributed to, the injury of Matson as alleged by him, and affirmatively pleading contributory negligence and assumption of risk on his part, and also that his injuries, if any, resulting from the fault of persons other than himself, were the result of the fault of his fellow servants. In the making and filing of this answer, the company attempted to preserve its special appearance as made in its motions to quash the service of summons. The portions of the answer, aside from its denials and pleading of affirmative defenses as above noticed, bearing upon the question of whether the company preserved its special appearance in the action, are the following:

"Comes now the defendant, Kennecott Mines Company, the court having overruled and denied its motion to quash service in this action and not waiving its motion to quash the service, and still reserving its special appearance, and its right to contest the question of the jurisdiction of this Honorable Court, submits this its answer to the complaint of the plaintiff.

"Wherefore the defendant Kennecott Mines Company having fully answered the complaint of plaintiff prays for judgment for dismissal and for costs."

Thereafter Matson filed his amended complaint and his second amended complaint, both of which were answered in order by the company in substance the same as it had answered his original complaint.

On June 14, 1916, the cause came regularly on for trial in the superior court sitting with a jury, counsel for the company still insisting that the appearance of the company was special and not general. Counsel for

the company then presented to the court and offered in evidence a duly certified copy of the articles of incorporation of the company, showing that it was a corporation organized under the laws of Nevada in November, 1906. Indorsed upon the certified copy of the articles so presented and offered in evidence was a statement over the signature of the secretary of state of Nevada, as follows: "Dissolved June 10, 1915." Counsel for the company also presented to the court and offered in evidence a duly certified copy of § 89 of the general corporation law of Nevada relating to the voluntary dissolution of corporations of that state. That section, after providing for the procedure and the manner of giving consent to a dissolution by those interested, provides that certain written evidence thereof

"shall be filed in the office of the secretary of state, who, upon being satisfied by due proof that the requirements aforesaid have been complied with, shall issue a certificate that such consent has been filed, and the corporation shall thereby be dissolved, and the secretary of state shall make an indorsement to that effect on the original certificate of incorporation and on the amendments thereto in his office."

Counsel for the company also presented to the court and offered in evidence a certificate of the secretary of state of Nevada, made as provided by the above quoted portion of section 89, further evidencing the disincorporation of the company. This was the first claim made that the company had been disincorporated. These papers showed an apparent disincorporation of the company before the commencement of the action. Thereupon counsel for Matson, claiming surprise at this proof of apparent disincorporation, having no notice that there would be a claim of its disincorporation, asked for a continuance of the cause to the end that they might be able to show that the company was,

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in fact, not disincorporated and, if necessary, plead additional facts to that end. The trial court thereupon granted this request, dismissed the jury and continued the case. The case was never thereafter brought to trial upon the merits.

Thereafter counsel for Matson filed his third amended complaint, setting up his cause of action against the company the same in substance as in his second amended complaint, upon which the case was proceeding to trial when continued. In this third amended complaint it was sought to make Stephen Birch a defendant in the action, upon the theory that he was the moving spirit in bringing about the disincorporation of the company and the organization of a new corporation which succeeded to the rights and properties of the company, and that this was accomplished by the fraudulent acts of Birch. That portion of the third amended complaint is a somewhat involved story, but we think this is a sufficient noticing of its nature. This third amended complaint, together with a summons in usual form, was served in King county upon Birch, who was then temporarily there, but whose residence was not in this state. Thereafter several motions were made by the respective parties which presented the question of Matson's being entitled to default as against both the company and Birch for want of answer to his third amended complaint; the question of the sufficiency of the allegation of Matson's third amended complaint to constitute a cause of action against Birch, properly triable in this case, the question of the dismissal of the third amended complaint and of the action as to Birch; and the question of the striking of the third amended complaint and the dismissal of the action as to the company. These motions were apparently all heard together, upon which hearing the court had before it the certified

copies of the articles of incorporation of the company, the indorsement thereon, and the certificate of the secretary of state of Nevada apparently showing that the company had been disincorporated, which papers had been offered in evidence upon the trial terminated by the continuance. The court also had before it a printed pamphlet offered in evidence by counsel for Matson, purporting to be an official publication of the general corporation law of Nevada issued by the secretary of state of Nevada, which pamphlet was considered in evidence by the court without objection on the part of counsel for the company, and which pamphlet contained § 89, above noticed and quoted from, and also the following provisions in § 90 of the general corporation law of Nevada:

“All corporations, whether they expire by limitation, or are otherwise dissolved, shall nevertheless be continued as bodies corporate, for the term of one year from such expiration or dissolution, and until all litigation to which such corporation is a party, if begun within that time and process served within said year, is ended, for the purpose of prosecuting and defending suits by or against them, begun within said time, . . .”

The result of the hearing upon these motions was that the court entered two orders which, in effect, finally terminated the action, both as to the company and Birch, and prevented a trial thereof upon the merits: (1) An order dismissing the action as to the company, containing recitals showing that the order of dismissal was by the court rested upon the ground that the company had been disincorporated and dissolved under the laws of Nevada before the commencement of the action; and (2) an order dismissing the action as to Birch, containing recitals indicating the court's opinion that Matson's third amended complaint did not constitute a cause of action against Birch tri-

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able in this action. The appeal of Matson is taken from these two orders terminating the action, and also from a subsequent order made by the court denying Matson a new trial upon the merits.

In so far as we are concerned with the claim of error in the entering of the order of dismissal as to the company, we have here presented two questions: (1) Assuming that the company was not disincorporated so as to prevent the commencement of this action against it, did the trial court acquire jurisdiction over the person of the company either by service of summons upon it in this state or by its general appearance in the action. (2) Was the company disincorporated under the laws of Nevada so as to prevent the commencement of this action.

We pass, without deciding, the question of whether jurisdiction was acquired by the court over the person of the company by service of summons upon it in this state, since we have arrived at the conclusion that, in any event, jurisdiction was acquired over it by its general appearance in the action, and that it appeared generally therein when it answered the original complaint upon the merits and prayed for a dismissal of the action and for judgment for costs against Matson. Section 241, Rem. Code, relating to the appearance by defendants, reads in part as follows:

“A defendant appears in an action when he answers, demurs, makes any application for an order therein, or gives the plaintiff written notice of his appearance. . . . Every such appearance made in an action shall be deemed a general appearance, unless the defendant in making the same states that the same is a special appearance.”

The concluding words of this section may suggest the thought that a defendant can limit any appearance he may make in an action so as to make it a special

appearance only, and thereby avoid submitting himself generally to the jurisdiction of the court, by simply stating "that the same is a special appearance," regardless of its real nature, and regardless of the fact that he may, in the making of his appearance, invoke the jurisdiction of the court by asking the rendition of a judgment or order in the case such as the court could only render when it has jurisdiction over the persons of the parties to the action. This, it seems to us, is the only possible theory upon which counsel for the company can rest their argument that the statements in their several answers effectively preserved their special appearances made in their several motions to quash the services of the summons. We think that the language of § 241, above quoted, does not mean that an appearance, which by its very nature is general, can be made special by the mere designation of it as such by the one making it; but that the language of the section means only that no appearance which by its nature can be made special will be regarded as special, unless the party asking it states that "the same is a special appearance;" that is, that even a motion confined by its terms exclusively to a challenging of the court's jurisdiction over the person of the defendant will not be considered a special appearance unless stated to be such, and that no appearance, which by its very nature is general, can be made special by a statement that it is special. When the company answered upon the merits in this case and prayed for judgment of dismissal and for costs, it in effect invoked the jurisdiction of the court and asked a determination of the cause upon the merits, which, of course, could not be done by the court unless it had jurisdiction over the person of both the company and Matson. Manifestly this prayer of the company's answers was more than a prayer for dismissal for want of jurisdiction. To so limit it

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would be to lose sight of both the negative and affirmative defenses pleaded in the body of the company's answers going to the merits of the case. The denials and allegations of the answers did not touch the question of jurisdiction, but related wholly to the merits of the case. Nor does the fact that the company stated in the introduction to its answers that it was preserving its special appearances negative the fact that it was also defending the case upon the merits.

In *Teater v. King*, 35 Wash. 138, 76 Pac. 688, there was involved a motion, in form a special appearance,

“(1) to quash the summons, and set aside the service thereof; (2) to set aside and quash the writ of restitution, for the reason that the same was prematurely issued, and that the court had no jurisdiction to issue the same; and (3) to dismiss the said action, for the reason that no summons had been issued and served in said cause as required by law.”

The court sustained the motion to quash the summons, but refused to quash the writ of restitution or dismiss the action. Later, another summons was issued and apparently served on the defendant. It was also moved against, as the former one was. The court, however, finally ruled that it had jurisdiction of the person of the defendant by virtue of his appearance in his motion to quash; this, upon the theory that it was in effect a general appearance. This court disposed of the question of jurisdiction over the person of the defendant, holding the appearance to be general, as follows:

“The appellant's position is that the action abated, when the original summons and service thereof were quashed and set aside, and therefore carried the proceedings for the writ of restitution with it, as an incident, and that the trial court erred in not quashing the writ and dismissing the case. There would be much force in appellant's contention, if he had not asked

the court below to dismiss the action. The appearance of appellant was in form special, for the purpose of objecting to the court's jurisdiction over his person, but in the body of his motion he invoked the jurisdiction of the court below on the merits, when he asked for a dismissal. A party desiring to successfully challenge jurisdiction over his person should not call into action the powers of the court over the subject-matter of the controversy. By so doing, he waives his special appearance, and will be held to have appeared generally."

This view of the law was adhered to in *Bain v. Thoms*, 44 Wash. 382, 87 Pac. 504. It may be said that, in that case, there was an asking for relief which was more clearly a submission to the jurisdiction of the court than in the *Teater* case. However, the defendant in the *Bain* case stated in his motion that he was "appearing specially herein for the purpose of questioning the jurisdiction of the court, and for no other purpose." Holding that the appearance was general and not special, though expressly stated in the motion to be special, this court quoted with approval from *Burdette v. Corgan*, 26 Kan. 102, as follows:

"... we remark that this appearance by the motion, though called special, was in fact a general appearance, and by it this defendant appeared so far as she could appear. The motion challenged the judgment not merely on jurisdictional but also on nonjurisdictional grounds, and whenever such a motion is made the appearance is general, no matter what the parties may call it in their motion."

We note that the *Bain* case, and also the Kansas case quoted from, involved motions to vacate default judgments upon the ground, among others, of want of jurisdiction over the persons of the defendants therein, but the problem presented in those cases was the same in substance as here, because the question in each was one of requiring the moving defendant to answer upon

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the merits, as well as one of the setting aside of the default judgments for want of process. It is also to be noted that the *Teater* and *Bain* cases were decided by this court long after the enactment of Rem. Code, § 241, above quoted from, and while the concluding words of that section, relied upon by counsel for the company in this case, were a part of our statute law relating to appearance.

The reason of this view of the law is well stated by the supreme court of Wisconsin in *Lowe v. Stringham*, 14 Wis. 241, as follows:

“We think it is also a waiver of such a defect [want of jurisdiction] for the party, after making his objection, to plead and go to trial on the merits. To allow him to do this, would be to give him this advantage. After objecting that he was not properly in court, he could go in, take his chance of a trial on the merits, and if it resulted against him, he could set it all aside upon the ground that he had never been properly got into court at all. If a party wishes to insist upon the objection that he is not in court, he must keep out for all purposes except to make that objection.”

See, also, *Merrill v. Houghton*, 51 N. H. 61; *Bucklin v. Stickler*, 32 Neb. 602, 49 N. W. 371; *Honeycutt v. Nyquist, Petersen & Co.*, 12 Wyo. 183, 74 Pac. 90, 109 Am. St. 975; *State ex rel. Mackey v. District Court of Fifth Judicial Dist.*, 40 Mont. 359, 106 Pac. 1098, 135 Am. St. 622; 2 R. C. L. 327; 4 C. J. 1318.

The early decision of this court in *Woodbury v. Henningsen*, 11 Wash. 12, 39 Pac. 243, holds to the contrary of our conclusion here reached. That discussion was not accompanied by the citation of any authorities upon the subject. We think that decision was in effect overruled by our later decisions in the *Teater* and *Bain* cases, above noticed.

In *Deming Inv. Co. v. Ely*, 21 Wash. 102, 57 Pac. 353, the challenge to the court's jurisdiction was upon

the ground that the case was not one wherein jurisdiction could be acquired by the publication of summons. It was held that, since the defendant's appearance was special in form and his motion went only to the question of jurisdiction over his person, he did not appear generally by moving to quash the service of the summons. In so holding, the court observed:

"If the granting of the relief requested in the appearance is consistent with a want of jurisdiction over the person, the defendant may appear for a special purpose, without submitting himself to the jurisdiction of the court for any other purpose."

This is quite in harmony with our present view of the law.

In *Walters v. Field*, 29 Wash. 558, 70 Pac. 66, wherein there was an answer by the defendant upon the merits, without any statement therein claiming such appearance to be special or claiming the preservation of his prior special appearance, the court did say, at page 565 of the opinion, that:

"The defendant could have preserved his special appearance in his answer to the merits, but he did not see fit to do so."

However, a reading of that decision, we think, renders it plain that the question of the preservation of a former special appearance by a statement to that effect in an answer upon the merits was not at all necessary to be decided in the case. If this can be considered as anything more than mere dictum, it was, in any event, also overruled in our later *Teater* and *Bain* cases, above noticed. This is the only American decision coming to our notice which can be at all regarded as suggesting that an appearance by an answer to the merits can be made special by merely asserting it to be special.

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In *Larsen v. Allan Line Steamship Co.*, 37 Wash. 555, 80 Pac. 181, 9 L. R. A. (N. S.) 1258, it seems to have been assumed merely for the purpose of argument that a special appearance can be preserved when the court is asked to make some ruling in the case other than upon the question of its jurisdiction over the person of the defendant. We do not think this decision is of any controlling force here, especially in view of our later decision in the *Bain* case, above noticed. We conclude that the superior court acquired jurisdiction over the person of the company by virtue of its general appearance, assuming that it was not disincorporated prior to the commencement of this action.

Was the company disincorporated under the laws of Nevada prior to the commencement of this action, so that it could not be sued as a corporate entity? If we had nothing before us other than the copy of its articles of incorporation with the indorsement thereon, certified by the secretary of state of Nevada, the certificate of the secretary as to the disincorporation of the company, and § 89 of the corporation law of Nevada, we would probably be required to hold that the disincorporation so evidenced would prevent the maintenance of this action. But when we look to the language of § 90 of the general corporation law of that state, here in evidence, which is above quoted from, it at once becomes apparent that, in so far as this action and its prosecution to final judgment is concerned, the company is not disincorporated. That section is as much a part of the law of the company's corporate being as § 89 of the general corporation law of Nevada, here relied upon by counsel for the company to show its disincorporation. Some contention is made that the provisions of § 90, continuing the life of a corporation for the purpose of continuing pending actions against

it and for the purpose of commencing actions against it, have no extraterritorial effect. We cannot agree with this contention. There is nothing in § 90, or elsewhere in the Nevada corporation law here in evidence, indicating to our minds any intent on the part of the legislature of Nevada to continue the corporate existence of a corporation of that state, as provided in § 90, only in that state.

The court of appeals of New York, in the comparatively recent case of *Sinnott v. Hanan*, 214 N. Y. 454, 108 N. E. 858, had for determination this exact question in substance, although that was a question of abatement of a pending action. A New Jersey corporation was disincorporated under the New Jersey law, much like this Nevada law, pending an action against it in the New York courts. Disposing of the question in harmony with our present view, Judge Collin, speaking for the New York court of appeals, said:

“The Corporation Act of New Jersey contained, however, a section (§ 53) as follows:

“‘All corporations, whether they expire by their own limitation or be annulled by the legislature or otherwise dissolved, shall be continued bodies corporate for the purpose of prosecuting and defending suits by or against them and of enabling them to settle and close their affairs, to dispose of and convey their property, and to divide their capital, but not for the purpose of continuing the business for which they were established.’

“Inasmuch as this section relates to and regulates the corporate existence and power, it has extraterritorial operation and effect, even as had the statute under which the corporation was created and which was a part of its charter and the law of its existence. *Relfe v. Rundle*, 103 U. S. 222; *Michigan State Bank v. Gardner*, 15 Gray 362. The existence and the powers of any foreign corporation coming into this state to

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do business are at all times subject to the law of its creation and of its domicile and, additionally, to our laws relating to it, and the terms laid down by our legislature as conditions of allowing it to transact business here. (*Bank of Augusta v. Earle*, 13 Peters 519, 588, 589; *Demarest v. Flack*, 128 N. Y. 205; *Hoyt v. Thompson's Executor*, 19 N. Y. 207.) The sections we have quoted are, therefore, entitled to recognition and enforcement by the courts of this state. They apparently and under authority (*American Surety Co. v. Great White Spirit Co.*, 58 N. J. Eq. 526) are parts of a legislative scheme respecting corporations, are in *pari materia*, and to be construed together. Their effect was to continue the life of the corporation as to its capacity to prosecute and defend suits by or against it, to settle and close its affairs, to dispose of and convey its property and to divide its capital, and to destroy its capacity and existence in all other respects and for all other purposes. Under them the action did not abate, because as to it the corporate existence was not affected. The corporation remained the defendant, with its power and authority to defend existent and unlesened."

Counsel for the company call our attention to *Marion Phosphate Co. v. Perry*, 74 Fed. 425, which they claim supports the contrary view. We do not so regard that case. It was there attempted to invoke the law of Florida in the determination of the question of the disincorporation of a Georgia corporation which became a party to litigation in the Federal court in Florida. The fifth Federal circuit court of appeals held simply that:

"The Chatham Investment Company, incorporated under the laws of the state of Georgia, when dissolved according to those laws, became a dissolved corporation everywhere,—dead in Florida as well as Georgia."

It was not claimed or suggested in that case that the corporation law of Georgia had any saving provision as to disincorporation, as the law of Florida

had, which was much like § 90 of the Nevada law here in evidence. That decision, like the New York decision above quoted from, means only that the coming into and going out of existence of a corporation is determinable from the laws of the state of creation. 10 Cyc. 1323. The defendant company, as we have seen, entered its general appearance in this action in January, 1916, when it filed its answer to Matson's original complaint. It was disincorporated for purposes other than that of litigation by and against it, and some other purposes not of moment here, in June, 1915, less than one year prior to entering its general appearance in this action, which had the same effect as the due service of a summons upon it at that time.

Thus this action comes within the express terms of § 90 of the Nevada law, which, in effect, continued the corporate existence of the company for the purpose of commencing actions against it for the period of one year following its disincorporation for other purposes. We are of the opinion that the company had a legal existence as a corporate entity for the purposes of this action at the time of its commencement, assuming that it was commenced at the time the company entered its general appearance therein; and that the action having been so commenced within one year following the disincorporation of the company for other purposes, the action may now proceed to final judgment upon the merits in favor of or against the company as a corporate entity. We conclude that the superior court erred in dismissing the action as to the defendant Kennecott Mines Company.

Did the superior court err in striking Matson's third amended complaint and dismissing the action as to Birch, whom Matson, by that complaint, attempted to bring into the case as a defendant with the company?

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We think not. In so far as Matson's cause of action against the company is concerned, it was set forth in his third amended complaint in substance the same as in his second amended complaint, upon which the trial was proceeding when the continuance was ordered. Manifestly the only purpose of the third amended complaint was to bring Birch and another corporation, which was not served, into the action as defendants, to the end that Birch and the other corporation might be compelled to account for the property of the company, which it was alleged they had appropriated in connection with the disincorporation of the company and the organization of the other corporation. We are of the opinion that this was not a proper subject of litigation in this action, though it may be a proper subject of litigation in another action looking to the compelling of an accounting for property of the company so alleged to have been appropriated, when Matson shall have recovered a judgment against the company in this action.

As to Matson's motion for default against the company for failure to answer his third amended complaint, we think the court did not err in denying it. The company had already answered the same allegations in Matson's second amended complaint.

It is also clear to us that the introduction in evidence, upon the hearing of the motions to dismiss, of the copy of the corporation law of Nevada, embodying § 90 thereof above quoted from, needed no prior pleading thereof, in view of the fact that it was introduced to negative the claimed disincorporation of the company. Hence the striking of Matson's third amended complaint, though properly done, did not in the least affect his right to have the court consider § 90 of that law in connection with § 89, offered in evidence and relied

upon by counsel for the company as showing its disincorporation.

The order dismissing the action as to the defendant Stephen Birch is affirmed. The orders dismissing the action as to the defendant Kennecott Mines Company and denying to the plaintiff Matson a new trial upon the merits as against that company are reversed. The cause is remanded to the superior court for trial upon the merits as against that company, upon Matson's second amended complaint, the answer of the company thereto, and Matson's reply to that answer, and for such further proceedings as are not inconsistent with this decision.

The defendant and respondent Birch is entitled to recover his costs in this court as against the plaintiff and appellant Matson, and Matson is entitled to recover his costs in this court as against the Kennecott Mines Company.

ELLIS, C. J., WEBSTER, MAIN, and FULLERTON, JJ.,
concur.

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[No. 14424. Department Two. April 4, 1918.]

K. D. BRABSTON *et al.*, Respondents, v.
J. E. SHREWSBURY, as Constable of
Seattle Precinct, King County,
et al., Appellants.¹

SHERIFFS AND CONSTABLES — ACTION FOR NEGLIGENCE — DAMAGES — MENTAL ANGUISH. Mental anguish and disgrace is not a proper element of damages for negligence on the part of a constable in breaking and leaving open a trunk in conducting a search for contraband liquor.

SAME—ACTION FOR NEGLIGENCE—EVIDENCE—SUFFICIENCY. In an action against a constable for the loss of a brooch, through his negligence in breaking and leaving open a trunk in conducting a search for contraband liquor, the testimony of the prosecuting witness as to the loss of the brooch is insufficient to support the judgment, where it was so improbable as to be utterly incredible and was impeached by two disinterested witnesses and other circumstances.

Appeal from a judgment of the superior court for King county, Tallman, J., entered May 17, 1917, upon findings in favor of the plaintiffs, in an action in tort, tried to the court. Reversed.

Alfred H. Lundin, Edwin C. Ewing, and Peters & Powell, for appellants.

James Kiefer, for respondents.

HOLCOMB, J.—Respondents had judgment upon a cause of action alleging negligence on the part of the officer in breaking and leaving open a trunk belonging to Mrs. Brabston, in conducting a search under a search warrant for suspected contraband liquor, in a hotel where respondents lodged, in North Bend, King county. There was an allegation of damage in the sum of \$400 by reason of “mental anguish, humiliation, annoyance, and disgrace,” which the court properly

¹Reported in 171 Pac. 1012.

refused to consider appropriate elements of damage in such action. It was alleged that a certain diamond brooch of the intrinsic value of \$350 was contained in the trunk at the time it was forcibly opened and searched, and that it had been stolen from the trunk, after the search and before respondents returned home some hours later, by reason of the trunk being carelessly and negligently left unlocked.

No allegation or evidence connected the officer with the actual abstraction of the brooch. There was no evidence tending to trace the theft to any person. The evidence as to the loss of the brooch was solely that of Mrs. Brabston. She testified, in substance, that the brooch was seen by her in her trunk when she left the room at about six o'clock in the morning of the day of the search to go from North Bend to Seattle; that she locked the trunk; that, when she returned, about 8:15 or 8:30 in the evening of the same day, the trunk had been opened by detaching the two locks on it, and had not been closed entirely; that the brooch and the box containing it were missing, and in place thereof had been left a cheap paste imitation worth about ten cents; that the brooch was worth \$350. She also testified that there was considerable other jewelry in the trunk aggregating in value approximately \$2,000, none of which was taken.

We cannot and do not believe this tale. It taxes credulity beyond the limit. It passes belief that some person other than the officers who made the search—who could have known nothing beforehand of it, since the deputy prosecuting attorney placed the search warrant in the hands of the officer after arriving at North Bend from Seattle about noon and the search of the premises occurred immediately—saw the brooch in its small box, purloined it after the officers had departed, substituted an imitation brooch in its place,

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and left \$1,700 worth of other jewelry in the trunk untouched.

Although mindful of the rule applicable when the trial court has the opportunity of seeing, hearing, and judging of the credibility of the witnesses at first hand, we are also cognizant that Mrs. Brabston was an interested witness and the most interested person in the success of her cause; that she was undoubtedly smarting under the sense of injury, "humiliation and disgrace," because of her effects having been searched for unlawful merchandise, no matter how lawful, technically, the search. We also must consider and weigh the evidence upon the record *de novo*, as required by law.

Two officers, Shrewsbury and another constable, conducted the search, and a deputy prosecuting attorney stood by and observed. They testified that they opened the trunk by prying out three small nails in each of the two locks, which loosened the locks from the trunk; that they lifted the tray out, felt around in the lower part of the trunk, "found nothing for which they were searching," replaced the contents of the trunk, replaced the tray in the same condition as before, closed the lid, replaced the locks, and inserted the three small nails in each as they were before except that the nails could not be clinched on the inside of the box of the trunk with the lid closed as they were before, but that outwardly the trunk and the locks had the same appearance as before they took off the locks; that, when they opened the trunk, no jewelry was visible in it; that they saw none. One of the constables was sued and the other was not, and the deputy prosecutor was not. Certainly, then, these two were, at least apparently, disinterested witnesses. There was some other evidence tending to show that Mrs. Brab-

ston had made statements tending to show that she had herself previously had her diamond brooch altered into ring settings; and that her husband objected to her keeping the brooch for personal reasons. The testimony of the principal witness for respondents, which stands alone as to the loss, being so thoroughly improbable as to be utterly incredible, we feel, upon the careful consideration thereof and of the whole record, that the preponderance of evidence does not support the findings of the trial court.

The judgment is therefore reversed.

ELLIS, C. J., and MOUNT, J., concur.

[No. 14459. Department Two. April 4, 1918.]

F. A. MORRIS, *Respondent*, v. HATTIE R. RAYMOND,
Appellant, HATTIE R. RAYMOND *et al.*,
Defendants.¹

MASTER AND SERVANT—INJURY TO THIRD PERSON—SCOPE OF EMPLOYMENT. The owner of an automobile is not liable for injuries sustained through the negligence of her employee while driving the car for his own pleasure after working hours.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered March 23, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained in an automobile collision. Reversed.

Wm. H. Pratt and *Chas. Bedford*, for appellant.

John Burton Keener, for respondent.

MOUNT, J.—Action for personal injuries. The plaintiff was injured on the night of October 23, 1916, in the city of Tacoma, by reason of a collision between a

¹Reported in 171 Pac. 1006.

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taxicab in which she was riding and a Ford automobile driven by the defendant W. B. Raymond. She brought this action against Hattie R. Raymond, Alice M. Raymond and W. B. Raymond, doing business under the firm name of Raymond Company, and alleged that W. B. Raymond was driving the automobile owned by the Raymond Company, in a reckless, careless and negligent manner, and ran into the taxicab in which plaintiff was riding, throwing her violently to the pavement and injuring her. The defendants, for answer to the complaint, denied generally all the allegations thereof, and alleged that the cause of the accident was the careless and negligent driving of the taxicab in which the plaintiff was riding. Upon a trial of these issues, the facts appeared as follows: Hattie R. Raymond is the mother of Alice M. Raymond and W. B. Raymond. These two children, at the time, were past the age of majority. Mrs. Raymond was conducting a scavenger business in the city of Tacoma. Her son, W. B. Raymond, was employed as manager at a salary, and her daughter, Alice M. Raymond, was bookkeeper. Mrs. Raymond inherited the business from her husband, who died about three years before the time of the accident. On the night of October 23, 1916, W. B. Raymond took the automobile, which belonged to his mother, and which in the daytime was used in the business in which she was engaged, and drove the car to Commerce street. The car stood there for about three hours. At about eleven o'clock, Mr. Raymond undertook to start the car, and he could not start it by cranking it. Some friends who were with him helped him push the car to a hill on Eleventh street. They started the car down the hill and all jumped onto the car when it moved down Eleventh street to Pacific avenue. About the time the car reached Pacific avenue the engine started, and Mr. Raymond then turned the

car upon the crossing of Eleventh street and Pacific avenue, intending to go back up the hill to his home. While crossing the street, the taxicab in which the plaintiff was riding came down the street at about twenty miles per hour. The cars collided at the northwest corner of those streets. The plaintiff was injured. At the close of the evidence, which showed these facts, each of the defendants moved for a directed verdict. The court granted this motion as to the defendant Alice M. Raymond, but denied it as to Hattie R. Raymond and W. B. Raymond. The jury returned a verdict of \$1,000 against Hattie R. Raymond and her son W. B. Raymond. Hattie R. Raymond has appealed from that judgment. W. B. Raymond has not appealed.

The principal contention of the appellant is that the court erred in refusing to direct a verdict in favor of the appellant. We think it is clear that this motion should have been sustained, and the jury directed as requested by the appellant.

There is no evidence of a partnership existing between the defendants except the mere fact that the business was conducted as the Raymond Co. It is not disputed in the record that Mrs. Raymond inherited this business from her husband and was conducting it as the sole proprietor. Her son W. B. Raymond was an employee, managing the business at a salary. Her daughter was bookkeeper. It was conclusively shown without dispute that W. B. Raymond, on the night in question, was using the automobile, which belonged to his mother, for his own pleasure and not in connection with business of his mother. If there was a partnership, it is clear that the other partners would not be liable under the circumstances shown. In the case of *Hamilton v. Vioue*, 90 Wash. 618, 156 Pac. 853, L. R. A. 1916E 1300, in considering this question, we said:

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“Even though it should be held that the Hamilton brothers were partners in the ownership of the car (losing sight, for the moment, of the general rule that ownership of property does not of itself create a partnership), no liability will follow to C. T. Hamilton, as the record fails to show that the car, at the time in question, was operated on behalf of, or within the reasonable scope of, any partnership business. W. W. Hamilton was, at the time of the accident, using the automobile for his own personal pleasure and that of his companions. Under such circumstances, there is no rule of law that will fasten liability against C. T. Hamilton.” [Citing a number of cases.]

The same is true in this case. There was no attempt on the part of the respondent to show that, at the time of the accident, W. B. Raymond was using the car in connection with his mother's business. The evidence conclusively shows without any dispute whatever that he was using the car for his own pleasure that night, and for no other purpose. In the case of *Ludberg v. Barghoorn*, 73 Wash. 476, 131 Pac. 1165, in concluding that case, we said:

“But where upon the defense it is shown conclusively and without any substantial dispute that the automobile was not being used at the time of the injury in the defendant's employment or upon his business, and was being used by some other person on business of his own and without any reference to the business of the owner, it becomes the duty of the court to direct the judgment under Rem. & Bal. Code, § 340.”

See, also, *Jones v. Hoge*, 47 Wash. 663, 92 Pac. 433, 125 Am. St. 915, 14 L. R. A. (N. S.) 216; *Bursch v. Greenough Bros. Co.*, 79 Wash. 109, 139 Pac. 870.

It is clear, therefore, that the appellant Hattie R. Raymond is not liable, either as a partner or as the owner of the automobile. Her son W. B. Raymond, who took the automobile and who was using it for his

own pleasure, is the only person liable for his negligence. He has not appealed.

The judgment of the trial court is therefore reversed, and the case ordered dismissed as to the appellant Hattie R. Raymond.

ELLIS, C. J., HOLCOMB, and CHADWICK, JJ., concur.

[No. 14481. Department One. April 4, 1918.]

ROSELLA CULLEY *et al.*, Respondents, v. KING COUNTY,
Appellant.¹

HIGHWAYS—INJURIES FROM DEFECTS—DUTY TO MAINTAIN BARRIER—EVIDENCE—SUFFICIENCY. It is not negligence to fail to maintain a barrier at the side of a county road, where, having regard to the character and amount of travel, the width of the road, the extent of the slope and the length of the portion claimed to require a railing, and whether the danger was obvious, it cannot be said that the danger was unusual or that the highway was unsafe for public travel in the ordinary way.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered June 23, 1917, upon findings in favor of the plaintiffs, in an action in tort, tried to the court. Reversed.

Alfred H. Lundin and *Edwin C. Ewing*, for appellant.

Charles A. Spirk, for respondents.

WEBSTER, J.—Respondents brought this action to recover damages for personal injuries sustained by Rosella Culley while traveling upon one of the established highways of King county. The cause was tried to the court without a jury, and from a judgment

¹Reported in 171 Pac. 1034.

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rendered in plaintiffs' favor the defendant has appealed. The sole question presented is the sufficiency of the evidence to sustain the recovery.

The complaint alleges that, at the point where the accident occurred, the highway in question was very narrow; that, on the north side thereof, there was a steep bank and on the south side a precipitous decline to the bed of a creek about fifteen feet below; that the south track of the highway was in dangerous proximity to the edge of the decline; that, on the afternoon of April 16, 1916, while respondents were driving along the highway, the rear wheels of the buggy in which they were riding struck a gully which had been worn in the highway at that point, and by reason thereof the respondent Rosella Culley and the horse and buggy were precipitated over the decline; that the injuries complained of resulted from the negligence of the county in maintaining the highway dangerously close to the edge of the decline without providing any barrier or protection, and in failing to keep the highway in a reasonable state of repair.

The case being before us for trial *de novo*, we have carefully examined the entire record and find these facts sustained by a preponderance of the evidence. The highway, though established for many years, was not extensively traveled. The grade of the incline up which respondents were driving was 17.8 per cent. The entire width of the roadway was nine feet, two inches, the traveled portion thereof being marked by parallel ruts varying from ten inches to two feet in depth. There was a space three feet wide between the center of the south rut and the crest of the decline toward the creek, the top of which space, at the point where the buggy went over, was approximately one foot above the bottom of the south rut of the roadway. The decline along the south slope of the embankment from its

crest to the creek varied in the degree of pitch from 2 to 1, to 1 1-3 to 1.

The theory of plaintiffs' case is that, when the rear wheels of the buggy struck the gully extending across the road, the earth to the south side gave way, causing the buggy and its occupants to be thrown over the bank. It is not contended that the road was not sufficiently wide at the point where the accident occurred to enable them to pass in safety if no gully had been there. When reduced to its final analysis, their position is that the giving way of the earth caused by the existence of the gully extending across the south edge of the road precipitated the buggy over the decline, which would not have occurred had there been a guard rail or barrier at that point. The overwhelming weight of the evidence is to the effect that there was no such gully, and no giving way of the earth; hence the absence of a barrier would seem to be wholly immaterial.

Nor can the recovery be sustained upon the theory that the county was negligent in failing to place a railing or barrier along the south side of the roadway. In *Leber v. King County*, 69 Wash. 134, 124 Pac. 397, 42 L. R. A. (N. S.) 267, we held that the duty to place barriers upon a highway, although travel thereon be in a degree dangerous, is not absolute, and that the law does not require such precaution unless the danger to be guarded against is unusual. The duty in this respect must necessarily depend upon the circumstances of the particular case, having regard to the character and amount of travel; the nature of the road itself, its width and general construction, the extent of the slope or descent of the bank, the length of the portion claimed to require a railing, whether the danger is concealed or obvious, the character of the place between which and the traveled road it is claimed the

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barrier should be erected, and the extent of the injury likely to occur if a railing is not maintained. That is to say, the question in each case is whether, under the facts disclosed by the evidence, the county, by not erecting the barrier, failed in its duty to maintain the highway in a reasonably safe condition for ordinary travel. Measured by this standard, it cannot be said that the danger, if any, to be guarded against, was unusual, or that the highway was unsafe for public travel in the ordinary way. In fact, the elevated portion of the roadway between the south wagon rut and the crest of the slope was in itself a sufficient barrier to insure the safety of vehicles traveling along the highway in the customary and proper manner. In determining the necessity of a barrier, the essential question is whether the highway is safe without one. Pertinent to the situation presented in this case, is the observation of the court in *Leber v. King County, supra*:

“We think it will require no argument to make plain the fact that here there was no extraordinary condition or unusual hazard of the road. A similar condition is to be found upon practically every mile of hill road in the state. The same hazard may be encountered a thousand times in every county of the state. Roads must be built and traveled, and to hold that the public cannot open their highways until they are prepared to fence their roads with barriers strong enough to hold a team and wagon when coming in violent contact with them, the condition being the ordinary condition of the country, would be to put a burden upon the public that it could not bear. It would prohibit the building of new roads and tend to the financial ruin of the counties undertaking to maintain the old ones.”

See, also, *Swain v. Spokane*, 94 Wash. 616, 162 Pac. 991, L. R. A. 1917D 754.

Furthermore, we are strongly inclined to the conclusion that the accident was due to the fact that the horse driven by the plaintiffs balked and backed the

vehicle out of the roadway and over the embankment. The evidence clearly gives rise to such inference as the only logical cause of the accident.

The judgment appealed from is reversed, and the cause remanded with instructions to enter judgment for the defendant.

ELLIS, C. J., FULLERTON, MAIN, and PARKER, JJ., concur.

[No. 14527. Department Two. April 4, 1918.]

WESTERN ACADEMY OF BEAUX ARTS, *Respondent*, v.
RALPH M. DE BIT, *Appellant*.¹

INJUNCTION—WHEN LIES—TO RESTRAIN TRESPASS. Injunction lies to restrain trespass upon property of a corporation platted as a village and inclosed by fences and gates, where defendant threatened to continue his unlawful trespasses, which endangered the peace of the community and the lives of the owners.

SAME—TO RESTRAIN TRESPASS—SOLVENCY OF DEFENDANT. In such case it is unnecessary to allege that the defendant was insolvent.

SAME—CONDITION PRECEDENT—BONDS. It is error to grant a temporary injunction without bond, in view of Rem. Code, § 725, providing that no injunction or restraining order shall be granted until bond is given in such sum as the judge shall fix.

Appeal from an order of the superior court for King county, French, J., entered August 10, 1917, restraining entry upon lands, pending action to restrain trespass. Reversed.

J. H. Templeton, for appellant.

Gay & Griffin, for respondent.

HOLCOMB, J.—This action was prosecuted to enjoin appellant from entering upon the thoroughfares and wharf in a plat of ground located on Lake Washington, and known as Beaux Arts Village. An order was

¹Reported in 171 Pac. 1036.

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issued by the lower court July 20, 1917, requiring appellant to appear and show cause on a day appointed why he should not be restrained and enjoined from entering upon the thoroughfares and wharf of Beaux Arts Village, pending the trial of the case on the merits. Hearing was had on the show-cause order on August 9, 1917, and a demurrer by appellant to the complaint being overruled, upon considering the affidavits filed in behalf of the respective parties, the court granted a temporary restraining order as prayed for pending the final hearing of the action and until the further order of the court. The same order recited that appellant, deeming himself aggrieved, gives notice of intention to appeal to the supreme court and requests that a supersedeas bond be fixed and a stay of proceedings be had until the same may be perfected; and the court fixed the sum of \$500 as the amount of the supersedeas bond and granted a stay of proceedings, for a period of forty-eight hours from three o'clock on August 9, 1917, to file the appeal and supersedeas bond, and that in case of failure so to do, the injunction order should be immediately in full force and effect; and that, if the appellant should thereafter fail to perfect his appeal and continue to be a trespasser, then he should be dealt with according to law as and for contempt. No bond of injunction was required.

Appellant assigns three errors: (1) That the court erred in overruling the demurrer; (2) that the court erred in granting a temporary restraining order or injunction *pendente lite*; (3) that the court erred in failing to require respondent to give a bond indemnifying appellant upon the issuing of the injunction.

The complaint showed that the respondent, a Washington corporation, is the owner of the tract of land platted into Beaux Arts Village. The land is sub-

divided into lots, with streets, alleys, parking strips, commons, and a wharf; around it had been built a high fence with gates. The corporation formed a society known as the Beaux Arts Village, and the members held land therein strictly in accordance with the grant of the deed, which was required to contain the following clause:

"The land herewith conveyed shall not at any time after the date hereof be sold, conveyed, leased, let, or sublet, or underlet, in whole or in part, to any person without written consent of the party of the first part."

It was alleged that appellant was unlawfully trespassing upon the property of the respondent; that he was threatening to so continue; that he was causing dissatisfaction and strife; was disrupting their social happiness; destroying their common well being; was a menace to the peace and dignity of the community; that he has an unsavory reputation for morals, peace and quiet, and is not tolerable or endurable; that his presence in the village is a danger and detriment to the same, depreciating its value as an ideal village; that he has assaulted certain persons and threatens to do so again; that he has used language calculated to cause a breach of the peace; that his behavior is belligerent, quarrelsome, and menacing, and that respondent fears that such conduct will culminate in serious acts endangering the peace of the community and the lives of its owners.

These allegations of continuing trespasses and threats and menaces to respondent and the inhabitants of the village were sufficient to warrant the issuance of an injunction if such facts were sufficiently proven. It is evident, therefore, that respondent would be damaged if the acts complained of were continued. *Silver v. Washington Inv. Co.*, 65 Wash. 541, 118 Pac. 748. It was not necessary to allege that appellant was in-

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solvent. *Silver v. Washington Inv. Co.*, *supra*; 14 R. C. L. 453; *Walker v. Stone*, 17 Wash. 578, 50 Pac. 488; *Sequim Canning Co. v. Bugge*, 49 Wash. 127, 94 Pac. 922.

The court, however, was without authority to grant a temporary restraining order without bonds. Section 725, Rem. Code, provides that "no injunction or restraining order shall be granted until the party asking it shall enter into a bond, in such a sum as shall be fixed by the court or judge granting the order, . . . conditioned to pay all damages and costs which may accrue by reason of the injunction or restraining order." Where a statute requires the giving of a bond as a condition precedent to the granting of an injunction, the court is not at liberty to disregard such statute, and it is error in such case to grant the injunction without the required bond. 2 High, Injunctions (4th ed.), § 1520; *Keeler v. White*, 10 Wash. 420, 38 Pac. 1134; *Cherry v. Western Washington Industrial Exp. Co.*, 11 Wash. 586, 40 Pac. 136; *Swope v. Seattle*, 35 Wash. 69, 76 Pac. 517.

The order was therefore invalid.

Reversed and remanded for further proceedings.

ELLIS, C. J., MOUNT, and CHADWICK, JJ., concur.

[No. 14599. Department Two. April 4, 1918.]

Theron T. Barbour *et al.*, Respondents, v. St. Paul
Fire & Marine Insurance Company, Appellant.¹

INSURANCE—FIRE POLICIES—EXAMINATION UNDER OATH—SIGNING. An appearance before a notary and submitting to an examination under oath is a substantial compliance with the provision of an insurance policy requiring the insured to submit to examination under oath and subscribe the same, although the original copy of the examination was not signed.

SAME—ACTIONS—"SUSTAINABLE"—CONDITION PRECEDENT—COMPLIANCE WITH CONDITIONS. A policy of insurance providing that no action shall be "sustainable" until after full compliance with all its requirements does not require full compliance before the action is commenced, but is satisfied by compliance at the time of trial.

SAME—POLICY—CANCELLATION—EVIDENCE—SUFFICIENCY. The evidence is insufficient to show the cancellation of a fire insurance policy by mutual consent where the company required that a receipt be signed before the policy was cancelled, and although the insured intended to cancel the policy, she refused to sign the receipt when tendered, and nothing further was done until after the loss.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered May 11, 1917, upon the verdict of a jury rendered in favor of the plaintiffs, by direction of the court, in an action upon a fire insurance policy. Affirmed.

H. T. Granger, for appellant.

J. W. Russell, for respondents.

CHADWICK, J.—This is an action on a policy of insurance brought by Theron T. Barbour and Mary Barbour, his wife, against the St. Paul Fire & Marine Insurance Company. At the close of the evidence, the trial judge instructed the jury to return a verdict in favor of the plaintiffs. The defendant insurance company has appealed.

¹Reported in 171 Pac. 1030.

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Appellant contends: (1) That plaintiffs did not comply with the provisions of the policy requiring the insured, if requested by the company, to submit to an examination under oath and subscribe the same, which is made a condition precedent to sustaining an action on the policy; (2) that the policy was cancelled by mutual consent prior to the time the loss occurred.

The policy provided:

"The insured, as often as required, shall . . . submit to examinations under oath by any person named by this company, and subscribe the same."

"No suit or action on this policy for the recovery of any claim, shall be *sustainable* in any court of law or equity until after full compliance by the insured with all the foregoing requirements, . . ." [Italics ours.]

At the request of the insurance company, Mrs. Barbour appeared before a notary public and was examined under oath by the attorney for appellant. She was given a carbon copy of her testimony to correct before signing. She did not sign the original copy of the examination until after the present action had been commenced, the examination being introduced in evidence by appellant.

When Mrs. Barbour appeared before the notary public and submitted to an examination under oath, there was a substantial compliance with this provision of the policy. The insurance company had obtained the information which it was designed to secure. The signing of the written result of the examination was a purely incidental matter.

But even if this were not so, when we look to the words of the policy, which it is well settled must be strictly construed against the insurance company, we do not find that it provides that no action shall be "commenced" but that no action shall be "sustainable." At the time plaintiffs sought to sustain their

action by proofs, the examination had been signed and was in the hands of the defendant. All that the policy required had been performed.

To decide whether or not the policy was cancelled by mutual consent prior to the time of the loss, requires a discussion of the facts. The plaintiffs were the owners of a house and lot in Edmonds, Washington. The house and its contents were insured in the Orient Insurance Company for \$1,900. The property was mortgaged; and the policy, which was payable to the mortgagee as its interest might appear, was in the possession of the mortgagee. In August, 1915, about the time the policy was due to expire, Mr. Barbour called on the insurance agent, Rudolph Damus, in Seattle, through whom he had obtained the insurance, and told him that he wanted it renewed without, however, specifying any particular company. Mr. Damus told him that he would attend to the matter.

Damus, who was not the agent of the defendant company, and in this instance was acting as a broker, ordered the insurance from the defendant's local agent. The policy was issued and delivered to Damus, or his office, but never reached the plaintiffs, probably, as the record suggests, being lost in the mail.

About the first of the following September, Mr. Barbour received a statement of his account from the mortgagee, which statement included an item of \$22.80 for an insurance premium. He testifies that he supposed this was the premium on the policy he had ordered through Damus. In July, 1916, nearly a year later, while Mr. Barbour was in British Columbia, Mrs. Barbour received a notice from Damus to the effect that \$22.80 was due him as a premium on insurance. She immediately investigated, and found that the policy secured by Damus was not the one covered by the statement sent by the mortgagee, and that the

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mortgagee had secured insurance in the same amount, \$1,900, on the property in the Continental Insurance Company.

She took the matter up with Mr. Damus, and he advised her that one policy would have to be cancelled, and suggested that it had better be the policy last issued. This was ascertained to be the policy on which this suit is brought. She then told Damus that "theirs (the policy secured by the mortgagee) was first and we would have to cancel the other one."

Damus then took the matter up with the local agent of the defendant, and according to the testimony of the agent, the following is what took place:

"He came down to the office and told me that they had other insurance on there. I asked him what company it was and he said 'Why, the Continental was one.' I said 'Well, that is funny,' and he said 'What are you going to do.' He told me the premium had not been paid. I said 'The only way to do, then, is to make out a receipt for the earned premium and get it and have the company sign it,' and I was pretty busy at the time and he said 'You wait a while and I will bring it up to you.' He said 'They are up there in the office now,' and I said 'All right, if that is the case I will get rid of it right now,' and I went and figured out the earned premium on the receipt and Mr. Damus was sitting right by the side of the desk when that was made, and I said 'There it is now; you can go right up and have your party sign it up.'"

The receipt was in the following form:

"LOST POLICY RECEIPT.

"St. Paul Fire & Marine Insurance Company of St. Paul.

"RELEASE FOR LOST POLICY.

"In consideration of 14.25 Dollars, the receipt of which is hereby acknowledged we surrender, release and relinquish all our right, title and interest in Policy No. 356369 (Renewal No.), of the St. Paul Fire & Marine Insurance Company of St. Paul, Minn., is-

sued at its Seattle, Wash., agency, and all advantages to be derived therefrom, and the said policy having been lost or mislaid, we agree to make no claim whatever for any loss or damage for which said company might become liable under said policy, and to return the said policy and renewal (if found) to the said company forthwith, and without further compensation. We hereby certify that said policy has not been assigned or transferred.

Witness:.....

“If this policy is payable in case of loss, this receipt must be signed by assured, mortgagee or other parties in interest.”

When Damus presented this receipt to Mrs. Barbour for her signature, she refused to sign it, and nothing further was done about the matter until after the loss occurred. Plaintiffs made claims against both the Continental Insurance Company and the defendant. The Continental settled; and the defendant refusing to do so, this suit was instituted.

It is clear, as appellant contends, that the plaintiffs never intended to carry more than \$1,900 worth of insurance; and if they are permitted to recover in this action, they will reap where they did not intend to sow. But it is also clear that they intended to order the policy which Damus secured from the defendant. Assuming, but not deciding, that Mrs. Barbour had authority to order a cancellation of the policy, we do not think the policy was actually cancelled. It is plain that she intended to cancel the policy and that the insurance company was willing to do so. But before the insurance company would actually cancel the policy, it required that a receipt be signed. This receipt was not signed, and as nothing further was done, the policy remained in full force and effect.

In order to effect the cancellation of a policy, there must be something more than a willingness on both sides that the policy be cancelled; there must be an

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actual agreement or understanding to the effect that the policy is then and there cancelled. That this was not so in the present case is clear.

Affirmed.

ELLIS, C. J., MOUNT, MAIN, and HOLCOMB, JJ., concur.

[No. 14617. Department Two. April 4, 1918.]

E. F. BROAD, LIMITED, *Respondent*, v. ERICKSON
CONSTRUCTION COMPANY, *Appellant*.¹

SALES—CONTRACT — PAYMENT — LIABILITY OF PURCHASER FOR EXCHANGE AND DISCOUNT. Defendant's contract with a timber brokerage concern of this state for materials to be ordered from plaintiff in Australia, the price to be paid in American money in Australia, the defendant furnishing a letter of credit to cover the price, is not a contract made between two parties in this state, but was a contract made between a party in this state and a party in Australia, and obligates the defendant to pay the exchange and discounts constituting the cost of making the payment in Australia; and the fixing of the price in American money was only a convenient way of stating it.

Appeal from a judgment of the superior court for King county, Albertson, J., entered April 13, 1917, upon findings in favor of the plaintiff, in an action upon contract, tried to the court. Affirmed.

Corwin S. Shank and *H. C. Belt*, for appellant.

Donworth & Todd, for respondent.

HOLCOMB, J.—This action is one to recover a balance alleged to be due upon the purchase price of a lot of Australian hardwood, sold and delivered by respondent to appellant for use in the construction of a drydock for the United States government at Bremerton. Upon the trial of the issues, the court found, in substance: (1) That respondent sold and delivered

¹Reported in 171 Pac. 1025.

to appellant hardwood timbers at an agreed price of \$31,242.49, and that the timbers were shipped from Sidney, Australia, to Bremerton; (2) that, in connection with such shipments, respondent incurred expenses in consular invoices and cablegrams in the amount of \$25.10, which expenses, according to the general custom of the trade, were to be paid by the purchaser or consignee; that appellant was indebted to respondent in that amount; (3) that appellant had paid \$30,063.36 to respondent and that there was a balance owing to the respondent from appellant in the sum of \$1,204.23; (4) that, according to the agreement between appellant and respondent, the timbers ordered were to be of certain dimensions as modified by the parties; that all of the timbers so ordered except 20,000 feet were up to the dimensions specified; (5) that the 20,000 feet which were not according to the dimensions specified could have been purchased at the sum of \$78 per thousand; that appellant sold the 20,000 feet for \$65 per thousand; (6) that appellant was damaged in the sum of \$260 by reason of the fact that 20,000 feet of the timbers were not up to the dimensions ordered, leaving a balance all told due to respondent of the sum of \$1,124.55. For the last mentioned sum, the trial court gave respondent judgment against appellant.

Appellant excepted to the findings numbered 3, 4, 5, and 6, and the conclusions of law in conformity therewith and supporting the judgment against it, and assigns its errors thereon.

All of these assignments involve questions of fact except as to the conclusions which followed the findings. We have carefully examined the entire record and are of the opinion that the evidence supports the findings of the trial court.

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The argument of appellant upon these assignments of error is considerably involved and complicated, but we think the issues were very simple. In finding No. 3, for instance, the court found that the agreed price of the timbers amounted to \$31,242.49. This was arrived at by computing the price of the short timbers at \$65 per thousand and of the longer timbers at that price plus three shillings per hundred feet extra, with a still greater price on a few extra long timbers. The price of three shillings extra upon long timbers appears in invoices made by the secretary of the respondent company; but Mr. Erickson himself, the president of appellant company, testified that there was an additional price to be paid for the longer timbers though he could not say from memory how much it was in difference, but an increase in price was agreed to. This increased price on the longer timbers appeared in each and every invoice and bill of lading through the period of shipment covering a year and two months, and no objection was made when the excess charge was first made, or thereafter, until this suit.

Objection is made to the allowance of the cost of consular invoices and cablegrams. It is conceded that the duty was to be paid by appellant upon the arrival of the shipments in this country. The consular invoices issued by the United States consular officer were necessary in order that the shipments could be received in this country and for the payment of duty. While there was a dispute as to whether the timbers were to be shipped f. o. b. Bremerton, or c. i. f., that is, cost, insurance and freight, there was testimony justifying the court in finding that the shipments were to be made cost, insurance and freight, and the insurance and freight were invariably paid by prepaying upon shipment and adding it to the cost of the timbers. The

other items, consular invoices and cablegrams, were included in cost and there was testimony that that was the invariable custom in shipments from overseas. These terms would include consular invoices and cablegrams incidental to shipments as well as insurance and freight.

The contract was made by appellant with the Ehrlich-Harrison Company, a timber brokerage concern of Seattle, acting through a Mr. Abbott. The contract was for the materials to be ordered from respondent in Sidney, Australia. The price to be paid was stated in American money, but was to be paid to the respondent in Australia, and appellant agreed to and did furnish a letter of credit to cover the \$60 per thousand which was to be paid to respondent in Australia. It was not, therefore, a contract made between two parties in this state, but was a contract made between a party in this state and a party in Australia. A letter of credit which appellant authorized its bank to deposit in a bank in Australia, followed by a cablegram and a letter from appellant's bank, apparently interpreted the understanding of the agreement between the parties on the part of appellant, that respondent should receive the \$60 per thousand feet upon shipping documents and policy of insurance, including consular invoice with costs, insurance and freight added to the cost of the timbers. This was later confirmed by letter from appellant to the bank in Sidney.

The third assignment of error assails the fifth finding of fact, to the effect that appellant had paid no part of the sum agreed upon except the sum of \$30,063.36, leaving a balance due and owing of \$1,204, based upon the contention that the court credited appellant only with the proceeds of the drafts negotiated for the advance payment at \$60 per thousand con-

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verted into American money at the current rate of \$4.8665. It is apparent that all that the court did was to convert the total credit of money paid by appellant in Australia in English money into American money at the then current rate, which amounted to the sum found in American money. It is claimed that, by this move, appellant lost approximately \$293.39 by reason of exchange and discounts on the payments made. But if appellant was to pay for the timber in Australia and was to stand the expense of making such payments, that is, charges and discounts, this loss of exchange and discounts must be borne by it. That was one of the costs and charges contemplated in the contract entered into. It is a contract whereby the payments were to be made not in the United States and in American money, but in Australia, and the fixing of the price at \$60 per thousand plus cost, freight and insurance, was only a convenient way of stating the price in American money.

As to the claim of error in the finding of the court that but 20,000 feet of the timbers delivered, instead of 46,626 feet, were too small, and in finding that the cost to the appellant of buying the additional lumber was \$1,560 instead of \$3,925.20, the amount which appellant paid to replace the shortage in timbers, the evidence, while in conflict, justified the finding.

It would serve no useful purpose to enter into an analysis of the intricate and voluminous evidence pro and con upon these points. Suffice it to say that, while the court might have found in favor of appellant upon these questions, the evidence does not preponderate against the findings; and while it is true that appellant paid \$84 per thousand for the timbers which it procured as necessary to complete its order, there was evidence which would have justified the trial court in finding that it could have procured the timbers for

\$76, while the trial court allowed \$78 per thousand for the 20,000 feet short.

Judgment affirmed.

ELLIS, C. J., MOUNT, and CHADWICK, JJ., concur.

[No. 14255. Department One. April 5, 1918.]

MAY BLAKE, *Appellant*, v. W. H. MERRITT, *Respondent*.¹

VENDOR AND PURCHASER—RESCISSION BY VENDEE—FRAUD—WAIVER. Fraud in the sale of land, in that the land conveyed was not the land shown and purchased, is waived, where after knowledge of the fraud, the vendee made two payments on the contract and paid the taxes, and did not commence suit for six months.

SAME—FORFEITURE OF CONTRACT — DEFENSES — ESTOPPEL. Vendee, prosecuting an action for rescission, cannot defeat forfeiture of the contract for nonpayment of installments on the ground that the vendor had accepted payments after they were past due, as such contentions are inconsistent.

Appeal from a judgment of the superior court for King county, Edward H. Wright, J., entered December 18, 1916, dismissing an action for money paid, notwithstanding the verdict of a jury in favor of the plaintiff, after a trial on the merits. Affirmed.

Douglas & Douglas and *A. H. Wiseman*, for appellant.

Saunders & Nelson and *George Harroun*, for respondent.

MAIN, J.—The plaintiff, claiming to have previously rescinded a contract for the purchase of real estate on the ground of fraud, brought this action to recover the money which had been paid in pursuance of the contract. The defendant denied the fraud and, by way of affirmative defense, claimed a forfeiture on account of

¹Reported in 171 Pac. 1013.

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the default of the plaintiff in making the payments as required by the contract. The affirmative defense was denied by a reply. The questions of fact were submitted to a jury and resulted in a verdict in favor of the plaintiff in the sum of \$1,398.32. Within the time required by law, the defendant moved for a judgment in his favor notwithstanding the verdict. This motion was sustained and a judgment entered, denying the right of the plaintiff to recover, and forfeiting the contract unless the plaintiff, within sixty days from the entry of the judgment, should pay the balance due thereon in the sum of \$871.60. From this judgment the plaintiff appeals.

The facts may be briefly stated as follows: On August 4, 1909, the appellant purchased from the respondent ten acres of land in Snohomish county. This land is located approximately two miles from the town of Edmonds, and within easy distance from the city of Seattle. The parties to the contract both resided in the latter city. A few days before the contract was executed, the respondent took the appellant out to show her the land. After going as far as they could upon the highway, they alighted from the vehicle in which they were riding and started to walk to the land. They went but a short distance and returned. The appellant claims that the land that she purchased was the land upon which they went, and was bordering upon the highway. The respondent claims that he did not, in fact, and did not intend to, sell the land near the highway, and that he told the appellant that the land which he contemplated selling her was about three quarters of a mile distant. He also claims that he desired the appellant to go and see the land which he contemplated selling, but, owing to the fact of its being a warm day and the tramp to the land not being an easy one, the appellant concluded not to make the trip, but

to purchase the land on the respondent's representation that it was land in general character like that upon which they then were. A few days later, the written contract above referred to was entered into, by which the appellant agreed to purchase the ten acres of land described therein for the sum of \$1,500, \$300 of which was paid at the time, and the balance, or \$1,200, was to be paid at the rate of \$10 per month. The land described in the contract is the land mentioned as being three quarters of a mile from the highway. The appellant testified that, during the early part of the year 1914, she first became suspicious that the land described in the contract was not the land near the highway which she had seen. A portion of her testimony on the subject is as follows:

"It was some time in the early part of 1914 when I became suspicious that the land described in the contract was not the land I really thought I bought. I discovered that I had been deceived at the time when the taxes were due in 1914. It was tax paying time, some time between March and June, 1914.

"It must have been some time before June, 1914, that Mr. Merritt and I had the conversation in which he told me that my land was not on a county road, and when he said 'that day when we went out to look at the land we were not right on your land.' "

Subsequent to the conversation detailed by the appellant, in which she says that the respondent told her that the land which she purchased was not near the road, and on June 2, 1914, she made a payment of \$10 on the contract, and on August 3, 1914, a payment of \$20. During the spring of 1915, she paid the 1914 taxes. During the summer of 1915 the appellant caused the land described in the contract to be located by a surveyor and for the first time saw it. After seeing the land, and having some negotiations with the respondent, she claims to have rescinded the contract.

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On January 10, 1916, the present action was begun. If there is fraud in this case, it is because the land described in the contract was not the land sold. The evidence took a somewhat wider range; but, without reviewing it here in detail, it may be said that the evidence will not sustain a charge of fraud in any other particular. The question whether the land sold was that described in the contract was submitted to the jury under a proper instruction, and the verdict of the jury will be accepted as determinative of this question.

It is first claimed that the trial court erred in granting the judgment notwithstanding the verdict. Whether this was error, depends upon whether the appellant, by making the payments on the contract and the payment of taxes subsequent to the time when she knew that the land described in the contract was not that which she claimed to have purchased, and by her delay in bringing the action, had waived her right to rescind the contract on the ground of fraud. The rule is that one who seeks to avoid a contract which he has been induced to enter into by fraudulent representations of another touching the subject-matter of the contract, must proceed with reasonable promptitude upon discovering the fraud, or the right to rescind will be waived. *Angel v. Columbia Canal Co.*, 69 Wash. 550, 125 Pac. 766; *Thomas v. McCue*, 19 Wash. 287, 53 Pac. 161; *Pearson v. Gullans*, 81 Wash. 57, 142 Pac. 456.

From the appellant's own testimony, it appears that she knew of the fraud prior to the month of June, 1914. Subsequent to this, she made two payments on the contract—\$10 on June 2, 1914, and \$20 on August 3, 1914. Sometime during the spring of 1915, she paid taxes for the previous year. The present action was brought on January 10, 1916. Under these undisputed facts, it must be held that the right to rescind had been waived. The appellant did not proceed with reasonable prompti-

tude upon discovering the fraud, if fraud were committed, and made the payments referred to with full knowledge thereof. The appellant claims that she is not barred of her right to prevail by reason of laches, but the doctrine of laches is not applicable to this case.

It is next claimed that the trial court erred in entering the judgment of forfeiture, even though such judgment was a conditional one and gave the appellant sixty days in which to meet the balance due. In support of this contention, it is argued that the respondent was not in a position to forfeit the contract because he had repeatedly accepted payments subsequent to the time that they were due and had thereby waived the clause in the contract which made time of the essence thereof; but this contention is hardly consistent with the contention that the contract had been rescinded. The appellant cannot wage her action on the theory of rescission, and at the same time urge the contract for the purpose of defeating the respondent's right to forfeit. She cannot in the same action proceed on the theory that the contract has been rescinded and also seek to enforce the terms of the contract. *Myers v. Calhoun, Denny & Ewing*, 85 Wash. 689, 149 Pac. 19.

The appellant will have sixty days after the remittitur from this court is filed in the superior court in which to comply with the judgment of the superior court covering the matter of forfeiture.

The judgment will be affirmed.

ELLIS, C. J., PARKER, FULLERTON, and WEBSTER, JJ.,
CONCUR.

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Opinion Per CHADWICK, J.

[No. 14433. Department Two. April 5, 1918.]

NELLIE KENNEDY, *Respondent*, v. FRANCES BURR,
Appellant.¹

EVIDENCE—DECLARATIONS AGAINST INTEREST—ADMISSIBILITY. In an action of deceit, upon an issue as to whether defendant, the executrix of an estate, had falsely represented the estate as insolvent, her report of assets to the state tax commission is competent as a declaration against interest and in rebuttal of the misrepresentations.

APPEAL—HARMLESS ERROR—EVIDENCE. It is not prejudicial to reject evidence of a memorandum which was incompetent if it had been admitted over objection.

EXECUTORS AND ADMINISTRATORS—LIABILITY—DECEIT. An executrix is liable for deceit if, by false representations that the estate was bankrupt, a claimant, in reliance thereon, failed to file a claim against the estate within the time limited by law.

SAME—LIABILITY FOR DECEIT—ACTIONS—INSTRUCTIONS. In an action against an executrix for deceit in representing the estate as bankrupt, an instruction that it was her duty to notify a claimant to file a claim against the estate, if she was negotiating for its payment, while inapt, was not prejudicial in view of the issue and an actual payment made upon the claim.

SAME—ACTIONS—DEFENSES. In such a case, a showing that the estate was incumbered did not overcome a *prima facie* case made that the estate was solvent; the burden then being on defendants to show not only incumbrances but insolvency.

Appeal from a judgment of the superior court for King county, Frater, J., entered February 6, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Affirmed.

Corwin S. Shank and *H. C. Belt*, for appellant.

James R. Chambers, for respondent.

CHADWICK, J.—This is an action for deceit.

The plaintiff is the holder of a note made by Arthur S. Burr in his lifetime. Defendant, surviving

¹Reported in 171 Pac. 1022.

wife and sole devisee of deceased, was appointed executrix of the will of her husband, and made publication of notice to creditors on May 16, 1914.

Plaintiff and the Burrs had been friendly to the point of intimacy for several years before Mr. Burr's death. Plaintiff had loaned Burr money which he had paid back. In October, 1914, after the qualification of defendant as executrix, she paid plaintiff interest amounting to \$22.50, and asked the plaintiff if she would wait for the principal, which plaintiff agreed to do, "If that would accommodate her in any way I would be glad to wait," says the plaintiff.

In the February following, plaintiff was in a hospital being treated for an injury. She asked defendant to call on her. The note was a subject of conversation. Plaintiff's version of the conversation is as follows:

"A. We talked about it. I asked her how she was fixed, how Mr. Burr left her, and if he left her in fairly good condition as to finances and she said that she was nearly crazy, that she was almost a bankrupt and that she was living on ten cent lunches a day, and I know I laughed and said that was kind of bad and let it go at that. Q. Did you or did you not believe those statements? A. I surely believed them. I would have no reason to disbelieve Mrs. Burr, because I had always found her a truthful woman. I believed it all. I was sorry for her to think she had to live on ten cent lunches a day? Q. She said she had to live on ten cent lunches a day? A. Yes, sir. Q. What effect, if any, did these statements have upon your failure to file a claim against the estate? A. I thought as long as she was so overworked that I would let it go, that she would pay me when she could, as her husband has always paid whatever he owed to me. If I had been up and around I would have looked after things better."

Defendant promised to call again. Nothing was done so plaintiff some three or four months thereafter had defendant summoned by telephone.

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"Then I asked her again if she couldn't do something for me, because my hospital bills were heavy and my doctor's bill heavy, and she asked if I would take \$25 a month and I said that would be better than nothing, but I could do more if I got it all in a bunch and she said 'I will write to my brother in New York and see what he will do for me.' Q. Was anything said about the estate? A. No, sir, the estate was not mentioned. I said that if it was all right I would like to have it in one sum, but she said 'I will write to my brother and let you know what I can do.' "

After the 16th of May, 1915, the time for filing claims, defendant either failed or refused to call upon, or communicate with, plaintiff in any way. Plaintiff wrote a letter saying, among other things:

"This is to let you know that I have left the hospital and am out to my friends, Miss Dixons, 6535 2nd Ave. N. E. I was very tired of the hospital and besides felt as tho must cut expenses as you know twenty-five dollars a week for fifteen weeks besides your other expenses amounts to something. Now, dear friend, I should love to have you do something for me. Under no other condition would I do this, but I simply must have some money. Now please see what you can do for me. My telephone is Kenwood 2490, and if you can come out . . . "

Plaintiff rested upon her assumption that the estate was bankrupt and defendant was distressed financially until some time thereafter when she employed counsel to look into the estate. Investigation revealed the fact that the estate had been appraised as of the value of \$26,071.30. This action was brought to recover damages fixed as the value of the note.

Defendant, by her answer, admits that she told plaintiff that she had obtained nothing from the estate for her personal use and that she was indulging in ten cent lunches; but denies that her statements were false and fraudulent, or that they were intended to deceive.

The case went to the jury on conflicting testimony. The verdict is conclusive of all the facts, but defendant assigns as error the ruling of the court admitting in evidence the appraisement, the report of the executrix to the state tax commission, and the order of solvency made by the court when the will was admitted to probate. This order is not in the files, but it was introduced at the trial. Counsel seem to rest their charge of error upon the belief that the issue was whether the estate was in fact worth a sum approximating the amount of the inventory, whereas the issue was whether defendant had falsely misrepresented the fact of solvency. The appraisement which was accepted and returned by her to the state tax commission was competent as a declaration against interest and a rebuttal of her statement that the estate was bankrupt.

But if it were not so, defendant is not prejudiced, for the order of solvency being in itself a judgment of a court of general jurisdiction, was competent to prove, at least *prima facie*, the issue to which it was directed, that is, the solvency of the estate.

It developed on the cross-examination of the plaintiff that a memorandum had been pinned to the note by Burr in his lifetime to the effect that "This note . . . is secured by an assignment of mortgage for \$500 with accrued interest, by Charles T. McDonald, said mortgage is due October 30, 1914, and is secured by lot 5, block 5, Central Seattle." The court rejected this offer because the defendant had not pleaded the fact. This is assigned as error, but no prejudice resulted. It was not competent as proof of an assignment in the absence of a showing that the assignment could not be produced. We can hardly hold that defendant has been prejudiced by a rejection of the memorandum when we would hold, as a matter of law,

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that the memorandum was incompetent if it had been admitted over objection.

It is complained that the court erred in instructing the jury that they might find defendant liable if they found that the statements made by her were false and fraudulent, and they further found that plaintiff relying on them did not file a claim against the estate.

This instruction goes to the gravamen of the case. It directs the mind of the jury to the controlling issue, that is, whether the representations were false and fraudulent, and whether, by reason thereof, plaintiff was misled to her damage. The action being for deceit, and not upon contract, the instruction was proper.

The giving of the following instruction is assigned as error:

"You are further instructed that the defendant as executrix of the estate of Arthur S. Burr, if you find from the evidence was negotiating with the plaintiff for the payment of the note signed by said Arthur S. Burr above mentioned within a year after giving notice to creditors, viz., on the 16th day of May, 1914, *it was the defendant's duty and obligation to notify and direct the plaintiff to file a sworn claim against said estate*, she being the executrix of the estate, and if you find from the evidence that the said defendant did so negotiate for the payment of said claim, but failed to so notify and direct the plaintiff to file such claim, then such failure is evidence which you may consider in connection with other evidence in the case that defendant intended to defraud plaintiff out of her said note and claim."

Counsel lays emphasis upon that part of the instruction which for convenience of argument we have italicized. It may be granted that the instruction is inapt in form, but when considered with the first condition, "if you find from the evidence (defendant) was negotiating with the plaintiff for the payment of the note,"

the italicized words mean no more than that a promise to pay coupled with a concealment of the fact that the claim should be presented as a claim against the estate was a circumstance which might be considered with other testimony as evidence of deceit. In the light of the issue and an actual payment upon the note, the instruction does not mean that the executor is under any duty, independent of the facts of the case, to advise the filing of a claim, but rather that he may be held as for deceit if it is shown that his negotiations for payment had gone to the extent of holding out his own promise, altho it may not be binding in law.

It is said that the verdict is excessive. The court instructed the measure of recovery as the amount of the note with interest. Counsel contends that a recovery could not in any event exceed the amount that the estate would have been able to pay, and inasmuch as it is not shown that the assets will exceed the liabilities on final settlement, no recovery can be had. Here again counsel fails to hold fast to the real issue. The contention is based on the assumption that the suit is against the executrix and is to be paid out of the estate. Solvency has a well defined meaning in law: it means an excess of assets over liabilities, the power to pay debts in due course. It is true that the defendant undertook to show that the estate was incumbered, but this did not overcome the *prima facie* case. The burden was on defendant to show, not incumbrances merely, but an actual state of insolvency to defeat plaintiff's case. This she not only did not do, but as we read the record, adroitly avoided doing.

Affirmed.

ELLIS, C. J., HOLCOMB, and MOUNT, JJ., concur.

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Statement of Case.

[No. 14446. Department One. April 5, 1918.]

LOUIS SINGER, *by his Guardian etc., Respondent*, v.
METZ COMPANY, *Appellant*.¹

APPEAL—BOND—TIME FOR FILING. Under Rem. Code, § 1721, providing that an appeal shall be ineffectual unless at or before the time of giving notice or five days thereafter, an appeal bond shall be filed, an appeal bond filed 83 days before the giving of notice is sufficient.

SAME—ABSTRACT — AMENDMENT — DISMISSAL. Under Rem. Code, § 1730-6, giving appellant an opportunity to amend or supplement the abstract if deficient, failure of the abstract to conform to court rules is not ground for dismissing the appeal in the first instance.

SAME—ABSTRACT—SUFFICIENCY. An abstract will not be struck out for defects that are amendable such as omissions in the title page; and it is not necessary to set out the pleadings or evidence in full.

APPEAL—REVIEW—VERDICT. Where the evidence was conflicting and the case was submitted on proper instructions, error cannot be predicated on the insufficiency of the evidence.

EVIDENCE—ADMISSIBILITY—RES GESTAE — DECLARATIONS AGAINST INTEREST. In an action for injuries sustained in an automobile collision, the statement by defendant's driver, taken down by a clerk in the police department that he had "cut the corner," is inadmissible either as part of the *res gestae* or as a declaration against interest by a party to the suit.

WITNESSES—IMPEACHMENT. Where a passenger in an automobile testified that the driver did not admit that he "cut the corner," the driver's statement that he had done so, taken down by a clerk in the police department, is inadmissible to impeach the witness; since a witness cannot be impeached by statements of others for which he was not responsible, and because it related to a collateral matter.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered March 24, 1917, upon the verdict of a jury rendered in favor of the plaintiff for personal injuries sustained in an automobile collision. Reversed.

¹Reported in 171 Pac. 1032.

J. Speed Smith and Henry Elliott, Jr., for appellant.

Leopold M. Stern and J. W. Russell, for respondent.

FULLERTON, J.—The respondent Louis Singer was riding a motorcycle, proceeding north on one of the streets of the city of Seattle, and an employee of the appellant was driving an automobile south on the same street, each on the proper side of the street under the law of the road. The driver of the automobile turned to the left, crossing the course of the motorcycle at an intersecting street which the two vehicles approached from opposite directions at about the same time. A collision occurred in which the respondent was seriously injured. The respondent brought the present action for damages, based on the alleged negligence of the driver of the automobile in failing to conform to the city ordinance requiring that vehicles turning from one street into another should make the turn around the center of the intersecting streets; the charge being that the driver “cut the corner of the street,” or, in other words, made a turn short of the center of the intersection instead of rounding that point. This was denied by the appellant, and the defense of contributory negligence set up. On submission to a jury, a verdict was returned awarding the respondent \$2,500 damages, and from the judgment thereon this appeal is prosecuted.

A motion to dismiss the appeal is made by the respondent on the ground that it is ineffectual because the appeal bond was filed some eighty-three days before the notice of appeal was served. Our statute provides that “an appeal in a civil action or proceeding shall become ineffectual for any purpose unless at or before the time when the notice of appeal is given or served, or within five days thereafter, an appeal bond to the adverse party . . . be filed with the clerk of the superior court.” Rem. Code, § 1721. It ap-

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pears that the notice of appeal was regularly given within the statutory time. The statute requiring an appeal bond, it will be noticed, permits it to be filed before the time when the notice of appeal is given or served and contains no limitation upon the extent of such antecedent period of time. *Laurendeau v. Fugelli*, 16 Wash. 367, 47 Pac. 759, is cited by respondent in support of his contention that the filing of the bond was premature, but it will be noted that our holding in that case is based on the fact that the appeal bond was filed prior to entry of judgment as well as prior to the notice of appeal. Under the statute then in force (Laws 1891, p. 342, § 6), the bond was required to be filed within five days after notice of appeal.

The respondent also urges as a ground for the dismissal of the appeal that the appellant's abstract of the record fails to comply with the statutes and rules of court. But this is not a ground for the dismissal of an appeal in the first instance. Under § 1730-6 of the Code (Rem.) the appellant must be given an opportunity to amend or supplement the abstract if it is found deficient, and the abstract stricken only after the opportunity is given and a refusal is made to supplement or amend. No order of the court for amendment of the abstract having been made, the motion for dismissal on the ground of its insufficiency is not well founded.

A motion is likewise made to strike the abstract of record on the grounds, that the title page does not disclose the court and judge before whom the cause was tried nor the names and addresses of the attorneys; that the pleadings are set out in full instead of being abstracted; and that portions of the evidence and the whole of the instructions are omitted. We find in this no sufficient ground for striking the abstract. The title page is capable of amendment. The rule does not exact the statement of the pleadings in substance, but

permits literal copies if the litigant deem them essential to show error. As to omissions of evidence and instructions, the statute and rules of court require the incorporation of such matters only as are deemed necessary to show the errors involved. Provision is made for the filing of a supplemental abstract by opposing counsel covering matters omitted and deemed essential to correct or supplement the original abstract, and ordinarily this is the sole remedy. But aside from this, ample remedies are provided for amending insufficient abstracts other than the striking them from the record on appeal, and they will not be stricken until these remedies are resorted to without success.

The motions are denied.

The appellant first asserts that it was entitled to a directed verdict, both at the close of respondent's evidence and at the conclusion of all the evidence, and to judgment notwithstanding verdict, on the grounds that the evidence failed to show negligence on its part, that it showed contributory negligence on the part of the respondent, and that it showed that the accident occurred while the automobile was being used by an employee of appellant, not in the course of his employment, but surreptitiously for the purpose of a Sunday pleasure trip by the employee. The evidence on all of these questions was conflicting, the case was submitted to the jury under proper instructions directed to these issues, and accordingly no error can be predicated upon the sufficiency of the evidence.

The second contention is that the court erred in the admission of evidence. The evidence introduced to show negligence on the part of the appellant was that its driver had cut the corner in turning from the one street into the other, instead of rounding the center of the intersection of the two streets as required by the city ordinance. This was one of the vital issues in the

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case and the evidence upon it was conflicting. The driver of appellant's automobile at the time of the accident left the state shortly thereafter and was not present as a witness at the trial. He had made statements in reference to the accident in reporting it to the police department, and these statements, which had been taken down in shorthand by a clerk in the department and afterwards written out, contained a purported declaration on the part of such driver that he had cut the corner of the street in making the turn. The declaration was not directly admissible in evidence on the theory of *res gestae* nor as a declaration against interest made by a party to the action. *Patterson v. Wabash St. L. & P. R.*, 54 Mich. 91, 19 N. W. 761; *Scheel v. Shaw*, 252 Pa. 451, 97 Atl. 685; *Ballard & Ballard Co. v. Durr*, 165 Ky. 632, 177 S. W. 445.

It was, however, introduced under the guise of impeaching testimony. The witness Spangler, who accompanied the driver Helvey to the police office, was cross-examined as follows:

"Q. Is it not a fact, Mr. Spangler, in making his report to the police department Mr. Helvey said, 'I cut the corner in making that turn . . . Said so in your presence, didn't he? A. No. Q. You heard and remember what he said. A. I heard every word. Q. And if he made such a statement, did you correct it there in the police department? A. I did not correct it because I did not hear any such statement made. Q. Were you in a position where if such statement were made, you would have heard it? A. I would; yes. Q. You were right alongside of Helvey all the time? A. Right alongside of him, yes."

Timely and proper objections were interposed to this cross-examination by the appellant. In rebuttal the respondent placed on the stand the police clerk, and, over proper objection by appellant, elicited the following: .

"Q. Have you your notes with you that you took at that time? A. Yes. Q. Turn to the statements made by Mr. Helvey first . . . In making that statement, did Mr. Helvey say this, or this in substance: 'I cut the corner—I cut the corner,' in speaking of the turn, of making the turn? A. Yes, he made that statement."

The court, as we say, permitted the admission of this evidence on the assumption that it was proper for the purpose of impeaching the witness Spangler. We think the trial court committed prejudicial error in allowing the introduction of such evidence. A witness cannot be impeached by statements of others for which he is not responsible and which have not been approved by him. *Virginia-Carolina Chemical Co. v. Knight*, 106 Va. 674, 56 S. E. 725; *Wharton v. Tacoma Fir Door Co.*, 58 Wash. 124, 107 Pac. 1057; *Louisville & N. R. Co. v. Webb*, 99 Ky. 332, 35 S. W. 1117.

The further reason suggests itself that the question to Spangler pertained to a matter collateral to the legitimate examination of Spangler, and in such a case contradictory evidence was inadmissible for the purpose of impeaching him upon such collateral matter. *State v. Carpenter*, 32 Wash. 254, 73 Pac. 357; *State v. Stone*, 66 Wash. 625, 120 Pac. 76; *State v. Schuman*, 89 Wash. 9, 153 Pac. 1084; *Wharton v. Tacoma Fir Door Co.*, *supra*.

For error of the court in refusing to exclude the police clerk Wall's testimony as to declarations made to him by Helvey, the judgment is reversed, with directions to the trial court to grant a new trial.

ELLIS, C. J., PARKER, MAIN, and WEBSTER, JJ., concur.

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Opinion Per ELLIS, C. J.

[No. 14361. Department Two. April 10, 1918.]

E. E. SIEGLEY, *Plaintiff*, v. T. NAKATA, *Appellant*,
H. G. KELLEY *et al.*, *Respondents*.¹

APPEAL—STATEMENT OF FACTS—TIME FOR FILING—EXTENSION. An *ex parte* order extending the time for filing a statement of facts is void.

SAME—STATEMENT OF FACTS—NOTICE OF EXTENSION OF TIME. Rem. Code, § 393, requiring notice of an application for an extension of time for filing a statement of facts requires "written" notice, and oral notice and stipulation that no objection would be filed does not work an estoppel.

JUDGMENT—PAYMENT—SUIT ON STAY BOND—EFFECT OF DISMISSAL. The dismissal of an action on a bond given to stay execution in a suit to vacate a judgment, merely releases the surety on the bond, and not the defendant independently and antecedently liable on the judgment, and does not operate as payment or prevent execution and sale under the judgment; and all that defendant can claim is that money paid for the discharge of the bond be credited on the judgment.

SAME — PARTIES CONCLUDED — PRIVIES. One who was a privy, though not a formal party, and whose attorney represented him in all the litigation relating to the quieting of title to certain land, is bound by a judgment in one of the suits, determining that the land was the separate property of a married woman who was a defendant in the suit.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered February 28, 1917, upon findings in favor of one of the defendants, upon a cross-complaint, in an action to quiet title, tried to the court. Modified.

Robert D. Hamlin and *Walter A. Keene*, for appellant.

R. B. Brown, for respondents.

ELLIS, C. J.—The plaintiff in this action is not concerned in this appeal. The validity of his claim against

¹Reported in 172 Pac. 203.

the real estate in question is not denied by any of the defendants. The contest in the court below was waged between defendants Kelley and wife, on the one hand, and defendant Nakata, on the other, upon issues raised by their respective cross-complaints, seeking to quiet title as against each other, and their respective answers to such cross-complaints.

Nakata claimed title through a sheriff's deed made to him as purchaser at sheriff's sale, under an execution issued upon a judgment rendered in the superior court for King county, and affirmed by this court in the case of *Sakai v. Keeley*, 66 Wash. 172, 119 Pac. 190. The Kelleys claimed that the real estate in question was the separate property of Mrs. Kelley and had been so adjudged in another action to which Nakata was privy, hence was not subject to sale on execution under the Sakai judgment against her husband. They further claimed that, in any event, the Sakai judgment had been paid and should be satisfied of record. The trial court held with defendants Kelley on both of these contentions and entered a decree quieting the title in Mrs. Kelley, directing that the Sakai judgment be satisfied of record, and declaring the execution sale and sheriff's deed thereunder null and void. Defendant Nakata prosecutes this appeal.

Respondents move to strike the statement of facts on the ground that it was not filed within the time limited by law, and ask that the decree be affirmed. The findings of fact and conclusions of law were signed and filed and the decree was entered on February 28, 1917. On March 29, 1917, appellant procured, on *ex parte* application, an order extending the time for filing the statement of facts for a period of thirty days from and after March 30, 1917. Appellant's proposed statement of facts was filed on April 5, 1917. On September 24, 1917, appellant filed in the trial court, and brings here

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by supplemental transcript, an affidavit of one of his attorneys to the effect that, shortly before procuring the order of extension, he orally advised respondents' attorney that the extension would be applied for and that respondents' attorney then assured the affiant that he would interpose no objection to such application. It is conceded that no formal notice of the application for extension, as required by Rem. Code, § 393, was given. That a copy of the order was subsequently served, we regard as immaterial. We have repeatedly held that an order extending the time for filing the statement of facts obtained on *ex parte* application is void. *Michaelson v. Overmeyer*, 77 Wash. 110, 137 Pac. 332; *Austin v. Petrovitsky*, 82 Wash. 343, 144 Pac. 26.

Unless, therefore, the facts set out in the affidavit above mentioned meet the statutory requirement of notice, or estop respondents from asserting their right to such notice, the statement of facts must be stricken. We are clear that they do neither of these things. The statutory requirement of notice means written notice. It cannot be assumed that the legislature intended that the evidence of this jurisdictional step to the procurement of the extension might rest in parol, often to be determined on conflicting testimony. That no estoppel arises, follows as a corollary. The most that can be said for the facts set out in the affidavit is that they tend to establish an oral stipulation that the application would not be contested. As such, it would legally bind no one. *Humes v. Hillman*, 39 Wash. 107, 80 Pac. 1104. In any event, it cannot be construed as a waiver of the statutory notice. To so hold would be to make the whole question of notice and waiver of notice rest in the uncertain memories of the parties or of their attorneys as to what was said and what was intended in every case. It would lead to needless uncertainty, end-

less confusion and exasperating controversies. As said in *Humes v. Hillman*, *supra*, "There must be a record here upon which the court can act." The statement of facts must be stricken, and it is so ordered.

But an affirmance of the decree does not necessarily follow. The question remains, do the findings of fact sustain the decree? The findings are extremely complicated and voluminous. We shall attempt no more than the following outline: On February 26, 1910, a judgment was entered by default against H. G. Kelley in the case of *Sakai v. Keeley*. An execution was issued thereon and levied upon lots 11 and 12, in block 14, Hillman City, Division 6, the land here involved. Kelley brought an action against Sakai and the sheriff to restrain the sale and to vacate the judgment. Nakata intervened in that action, claiming to own the Sakai judgment as assignee of Sakai, and contested the action to vacate in the trial court and on Kelley's appeal to this court. Kelley, in order to stay the execution, filed, in the action to vacate, a stay bond with National Surety Company as surety, conditioned that he as principal and the surety company as surety would pay the Sakai judgment if Kelley failed to have it set aside. Kelley failed in his action to vacate, which was dismissed with \$20 costs to defendants therein. That judgment was, on appeal, affirmed by this court. (See *Kelley v. Sakai*, 72 Wash. 364, 130 Pac. 503.)

While the action to vacate was pending in the supreme court, an execution was issued, without notice or knowledge on Kelley's part, on the judgment for \$20 costs, and levy was made upon the real estate here involved, which was thereafter sold by the sheriff to one Hall for and on behalf of Hamlin and Meier, then attorneys for Nakata. Hall and wife, on June 20, 1914, assigned the certificate of sale to Robert D. Hamlin, who in due time procured a sheriff's deed convey-

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ing to him the land here in question. Hamlin then brought an action in the superior court of King county to quiet title against Kelley and wife. They defended on the ground that the lots in question were the separate property of Mrs. Kelley, and the court, after a hearing on the evidence, so found and entered a decree quieting the title in Mrs. Kelley as her separate property, directing, however, that Kelley pay to Hamlin the \$20 and costs, amounting in all to \$54.20, which sum was paid by Kelley and accepted by Hamlin. That decree was never appealed from and is still in full force and effect.

Thereafter Nakata brought an action in the superior court of King county against H. G. Kelley and National Surety Company on the bond given in Kelley's action to vacate the Sakai judgment, which bond was conditioned to pay that judgment in case of his failure to vacate it, and demanded judgment for the full amount of the Sakai judgment and costs. Issue was joined, and the court, after hearing the evidence, found against Nakata and on May 5, 1914, dismissed the action, with costs against Nakata. Nakata gave notice of appeal from the order of dismissal, but thereafter the parties, through their respective attorneys, stipulated that the judgment of May 5, 1914, be set aside and that the action on the bond be dismissed "with prejudice and without costs to either party, \$150 being paid as full satisfaction herein." Thereupon the defendants in that action paid to Nakata, through Hamlin and Meier, his attorneys, the sum of \$150, and the judgment of dismissal and for costs was set aside and the cause was dismissed "with prejudice, and without costs to either party."

The trial court specifically found that, from the time Nakata intervened in Kelley's action to vacate the Sakai judgment, up to January 10, 1915, Nakata "was

represented in all had and determined between himself and the defendants H. G. Kelley and Anita Ford Kelley, his wife, by Hamlin and Meier, and ever since said time by the said Robert D. Hamlin, who was or claimed to represent him in the said several causes."

After the filing of the stipulation and entry of the order of dismissal above mentioned, Nakata, through his attorneys, caused to be issued on the Sakai judgment an execution and caused the sheriff of King county to levy upon the lots here involved and to sell the same on October 10, 1914, at which sale Nakata was purchaser and received a sheriff's certificate of purchase. On May 15, 1916, that sale was confirmed by the court, and the sheriff executed to Nakata a sheriff's deed of the lots which deed constitutes Nakata's only claim of title thereto.

As matters of law, the court concluded that, at the time of the issuance of the last mentioned execution, the Sakai judgment had been fully paid; that the execution was wrongfully issued; that the Sakai judgment should be satisfied of record; that the sheriff's sale and deed are null and void and the Kelleys are entitled to have the same cancelled, vacated and set aside; that Anita Ford Kelley is entitled to a decree quieting title in her as against Nakata and all persons claiming through or under him, and that the Kelleys are entitled to their costs. Decree went accordingly.

Appellant, Nakata, contends that the court's conclusion that the Sakai judgment had been fully paid is erroneous. This contention must be sustained. That conclusion was evidently based upon the order dismissing with prejudice the suit against Kelley and the National Surety Company upon the stay bond. That suit, however, was a suit upon the bond and upon its covenants. The Sakai judgment was only collaterally involved. True, had that suit been successful, the

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measure of Nakata's recovery would have been the full amount of the Sakai judgment. Such was the covenant of the bond. True, also, a payment in full of such a judgment on the bond would have operated as a satisfaction of the Sakai judgment. But no such judgment was rendered or paid. The stipulation for dismissal and the order entered thereon mean nothing more than a dismissal with prejudice of the suit on the bond. This, of course, released the surety from all further liability to pay the Sakai judgment simply because it was a mere surety. But it did not release Kelley. He was not a surety. His liability for that judgment was not traceable to the bond but existed antecedently to and independently of the bond. Touching that liability, both the stipulation and the order of dismissal were silent. The validity of the Sakai judgment as against Kelley was not in issue in that suit. The very terms of the bond precluded that issue. The most, therefore, that Kelley can claim is that the \$150 paid for the discharge of the bond should be credited upon the Sakai judgment.

Appellant next contends that the court erred in his conclusion that the lots here involved were the separate property of respondent Anita Ford Kelley. This conclusion evidently rests upon the finding detailing the sheriff's sale to Hall on behalf of Hamlin and Meier under the execution on the judgment for costs in the action of *Kelley v. Sakai* to vacate the Sakai judgment, in which suit Nakata had intervened and was the real contesting defendant, and on the finding that Hamlin's title, referable to the sheriff's deed based on that sale, was defeated in his suit against the Kelleys and that the title of the lots in question was by decree quieted in Anita Ford Kelley as her separate property. Appellant insists that the evidence shows that he had no knowledge of this suit, that it

was not prosecuted in his interest, but solely in the interest of Hamlin and to collect costs advanced for appellant, and that as to appellant it was *res inter alios acta*. But the evidence is not before us and the trial judge found none of these things. On the contrary, he found, in substance, that, in all of this litigation subsequent to appellant's intervention in the action of *Kelley v. Sakai*, Hamlin was acting as attorney for appellant. Moreover, since the title claimed by Hamlin in his suit against the Kelleys was based upon the judgment for costs in appellant's favor rendered in Kelley's suit to vacate, it can hardly be conceived that, had Hamlin's suit to quiet title been successful, he would not have admittedly held title to the lots in trust for appellant, subject only to whatever was due him from appellant for costs and fees. But the court did not even find that there was any sum due from appellant to Hamlin. The findings of the trial court are capable of no other construction than that appellant was a privy, though not a formal party, to all of this litigation. As such, he is bound by the decree in the case of Hamlin v. Kelley *et ux.*, adjudging that the property in question was the separate property of Anita Ford Kelley.

We conclude that the Sakai judgment remains unsatisfied except in the sum of \$150, which should be credited thereon; that the execution was not wrongfully issued, but that it was wrongfully levied upon the separate property of Anita Ford Kelley; and that, in other respects, the trial court's conclusions and decree are supported by the findings.

The cause is remanded with direction to modify the decree in accordance with this opinion.

MOUNT, CHADWICK, and HOLCOMB, JJ., concur.

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[No. 14658. Department Two. April 10, 1918.]

THE STATE OF WASHINGTON, *on the Relation of*
Mary I. Martin, as next friend of Judge
R. Andrews, Plaintiff, v. THE SUPERIOR
COURT FOR KING COUNTY, *John S. Jurey,*
*Judge, Respondent.*¹

MANDAMUS—TO COURTS—ERRONEOUS DISMISSAL FOR WANT OF JURISDICTION—REMEDY BY APPEAL. Mandamus lies to compel a superior court to proceed with a case which it erroneously dismissed on the mistaken belief that it had no jurisdiction; since the judgment rests upon a disclaimer of the judicial function, and is not a judicial act which ought to be reviewed on appeal (MOUNT and PARKER, JJ., dissenting).

INSANE PERSONS—INQUISITIONS—DISCHARGE—JURISDICTION OF COURTS. The superior court having general jurisdiction over insane persons, has inherent jurisdiction irrespective of statute to discharge or commit an insane person, and such power is not affected by the repeal of Rem. Code, § 1671, authorizing the discharge of an insane person upon recovering his reason.

SAME—DISCHARGE—PROCEEDINGS. Where an insane person is out on parole given by a judge of the superior court that committed him to the hospital, the courts have jurisdiction to discharge him without the necessity of first applying to the superintendent of the hospital and there claiming his exemption from restraint.

Application for a writ of mandamus, filed in the supreme court January 28, 1918. Granted.

Davis & Neal, for relator.

James B. Kinne, for respondent.

CHADWICK, J.—This is an application for a writ of mandate to compel the respondent superior judge to take jurisdiction of, and hear, the petition of the relator, who appears as the next friend of Judge R. An-

¹Reported in 172 Pac. 257.

drews, who is under the parole of a superior judge of King county as an insane person. Relator filed his petition in the original proceeding, setting up the present sanity of Andrews, and asking the court to so declare by order or judgment.

The wife of Andrews, who had theretofore been appointed as his guardian, appeared by counsel and demurred to the petition. The matter coming on regularly to be heard, the court entertained a plea to the jurisdiction of the court to hear the petition, and held that the superior court was without jurisdiction to hear and determine. At the request of counsel, a judgment of dismissal was withheld until application could be made to this court for a writ of mandate.

Although counsel waives all question as to the propriety of granting the writ, we have not been able to overcome the objection, *sua sponte*, of at least one member of the department that the writ should not issue for the reason that relator has an adequate remedy by appeal. It is said that the writ cannot issue without overruling certain decisions of this court.

It seems to the writer and his associates who join in this opinion that a writ may issue. But for the objection, we had thought that the right of a court to direct an inferior court to assume jurisdiction in a proper case, where jurisdiction had been denied, and to hear and determine, had never been questioned. Jurisdiction is the power to hear and determine. It is the power by which courts take cognizance of and decide cases.

“Jurisdiction is of two sorts—jurisdiction over the subject-matter, and jurisdiction over the party with reference to that subject-matter.” 4 Words & Phrases, p. 3884.

“It is settled beyond controversy that where a court acting on an erroneous view of the law declines juris-

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diction of a cause, mandamus will lie to compel it to take cognizance thereof." Note, Ann. Cas. 1915D 199.

See, also, 26 Cyc. 190 *et seq.*

It was:

"One of the ancient offices of this writ . . . to compel action by lower judicial tribunals respecting matters properly before them and within their jurisdiction. If such courts decline to exercise their judicature or to decide matters pending before them, mandamus has always been regarded as the appropriate means by which to set in motion their jurisdictional power. It lies to compel the performance of whatever appertains to the duty of lower courts, where there has been for any reason a refusal to act. Its agency in cases of this class is confined to setting in motion the judicial activities so that a decision will be reached, but it does not extend to any direction as to what that decision ought to be." *Crocker v. Justices of Superior Court*, 208 Mass. 162, 94 N. E. 369.

It was so held in *State ex rel. Shannon v. Hunter*, 3 Wash. 92, 27 Pac. 1076, where the court, although admitting a doubt which to us seems fanciful, held on authority that, "the proper remedy where a cause has been erroneously dismissed for want of jurisdiction, is mandamus."

This case was followed in *State ex rel. Maltby v. Superior Court*, 7 Wash. 223, 34 Pac. 922. In this case, the court says the rule rests in the highest authority. Of this there can be no question. It may be questioned whether any authority can be found to the contrary. See, also, *State ex rel. Smith v. Parker*, 12 Wash. 685, 42 Pac. 113; *State ex rel. Smith v. McClinton*, 17 Wash. 45, 48 Pac. 740. Lack of space permits the citation of but few of scores of cases. The rule is recognized by every text writer and may be found in every encyclopedia.

Says Mr. High in his Extraordinary Legal Remedies, at §§ 147, 148:

“The jurisdiction by writ of mandamus over inferior judicial tribunals, although closely guarded and jealously exercised by the courts, is too well established to admit of controversy, and forms one of the most salutary features of the general jurisdiction of the courts by mandamus. It is most frequently invoked for the purpose of setting inferior courts in motion, and to compel them to act when action has been either refused or delayed. The earlier remedy, adopted in England, for the refusal or neglect of justice on the part of the courts, was by writ of *procedendo ad iudicium*. This was an original writ, issuing out of chancery, to the judges of any subordinate court, commanding them in the king’s name to proceed to judgment, but without specifying any particular judgment. If this writ was disobeyed, or if the judges to whom it was addressed still neglected or refused to act, they were liable to punishment for contempt, or by an attachment returnable either in the king’s bench or in the common pleas.

“The use of the writ of *procedendo* for the purpose of quickening the action of inferior courts, and preventing a delay of justice, has in modern times been superseded by the writ of mandamus. And the latter is now regarded as the proper, if not the only remedy, by which the sovereign power may compel the performance of official duty by inferior magistrates and officers of the law.”

See, also, Spelling, Injunction and Other Extraordinary Remedies (2d ed.), § 171; Works, Courts and Their Jurisdiction, p. 620; Merrill, Mandamus, §§ 36, 203; Tapping, Mandamus, § 154.

The theory advanced against the weight of authority is, if a court has no jurisdiction, it must be granted that it has jurisdiction to hold that it is without jurisdiction, and this being so, a refusal of a court to take jurisdiction is no more than error, and, like any other error, is to be corrected on appeal.

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Of all the text writers, Mr. Bailey in his work on Jurisdiction is the only one who seems to lend sanction to this theory. He says:

"Some courts make the distinction that where the court entertains jurisdiction, then its decision cannot be controlled, but where it refuses to exercise jurisdiction it may be compelled. On first impression it would seem that, where the jurisdiction of the court is invoked by petition or other proceeding, and the court entertains the proceeding to the extent of acting upon it and determining its sufficiency or insufficiency, it has assumed jurisdiction, and, though its determination may have been erroneous, this is but an error of judgment; that it has exercised its judgment and discretion, which is not subject to review by *mandamus*, and that ordinarily such error may be corrected upon appeal or by writ of error. Where, however, such determination cannot be reviewed, then the writ might issue to prevent a failure of justice." 2 Bailey, Jurisdiction, § 594.

This he advances without authority or color of authority. While citation of authority would not make it good law, if it were bad, like many first impressions, it will not stand the test of reason. It will not go on paper, and this we suspect is why it finds no mention in the books.

It is fundamental that a higher court will not control the judicial acts of an inferior court. It will not invade the realm. Its prime function is to review for error. The first consideration, then, must be to determine the character of the act of the inferior court. Is a judgment of dismissal based upon a denial of jurisdiction over a subject-matter a judicial act in the sense that it is a judgment which ought to be reviewed on appeal?

A dismissal under the mistaken belief that the court has no jurisdiction is in no sense a judicial act for it rests upon a disclaimer of the judicial function. The

court has neither heard nor determined. Neither the law nor the facts are affected in the slightest degree, and appeals being for the correction of judicial errors, errors of discretion or of the judicial mind, it follows that one entitled should have resort to some method by which the court can be set in motion. The court has done nothing which is either judicial or discretionary. It has refused to do either. Its judgment is *nullius filius*, a void thing, binding no one, a legal non-entity.

"Where an action is dismissed on the sole ground that the court has no jurisdiction of the subject-matter of the suit . . . this is of course no adjudication of the merits and no bar to another action for the same cause." 2 Black, Judgments (2d ed.), § 713.

In *Cowan v. Fulton*, 23 Gratt. (Va.) 579, the court denied its jurisdiction upon the ground that the act relied on to sustain it was unconstitutional.

It was held that a writ should issue, the court saying:

"But it is insisted that conceding the law referred to, to be constitutional, still the judgment of the circuit court, dismissing the cause for want of jurisdiction, and striking it from the docket, is a final judgment in the cause; and the term at which this supposed judgment was rendered, having passed by, it is not competent to the appellate court, by *mandamus*, to compel in effect a rehearing of the cause.

"If the premises were true, the conclusion might perhaps be conceded; for it certainly is not regular nor proper to use the writ of *mandamus* to review or rehear the judgments of a subordinate court; but the fallacy of the argument consists in the assumption that there was a judgment in the cause; whereas the court positively and unequivocally refused to pass on it at all, either 'to review, reverse or affirm the judgment'; and merely *directed* 'that the cause be dismissed and stricken from the docket.' It was a simple refusal to

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hear and decide the case; and this court having held that no appeal lies from such refusal, it is exactly the case to which the highly remedial writ of mandamus is most frequently applied, in order to prevent a defect or failure of justice. . . .

“Original jurisdiction to award writs of mandamus upon these principles of the common law, has been conferred on this court by the constitution and laws of the state; and in accordance therewith, we say to the judge of the circuit court of Pulaski, that he has the constitutional power to hear and finally dispose of the cause referred to, as by an appellate court; and that it is his duty so to do.”

It is the rule in the Federal courts that every party has a right to a judgment of the court; and that the writ will issue in a case where an inferior court has improperly dismissed a cause under a disclaimer of power to entertain jurisdiction of the subject-matter, and the case will be reinstated with instructions to try and determine. *Ex parte Bradstreet*, 7 Pet. (32 U. S.) *634, 647.

It is also held that a refusal of a court to take jurisdiction, it having jurisdiction, is not a final judgment in the sense which authorizes a writ of error, and the remedy is properly by way of mandamus. *Railroad Co. v. Wiswall*, 23 Wall. (90 U. S.) 507.

This decision was afterwards overcome by a statute which gave a right of review by writ of error. A later statute took away both remedies and made the order final. The case nevertheless stands as an authority upon the principle involved. It is a judicial expression as distinguished from the later expressions of the legislative body.

In *People v. Swift*, 59 Mich. 529, 26 N. W. 694, the lower court had quashed certain indictments under the mistaken notion that it had no jurisdiction. It was contended that a writ of error was the proper remedy. Here that appeal is the proper remedy. So that we

have the same case, for the office of the two remedies is the same, to reverse, modify or affirm.

The court said:

“Judgment on a writ of error, in such a case, would merely vacate the order to quash, and while, no doubt, the recorder’s court would in such case proceed, yet the real purpose of this application is to speed the trial, and a mandamus seems more fitting than a writ of error where the duty would be inferred rather than expressed.”

The dialogue between Lord Ellenborough and counsel, reported in *King v. Justices of Kent*, 14 East 395, is of interest.

“Lord Ellenborough, C. J. . . . If the justices had rejected the application in the exercise of the discretion vested in them by legislature, this court would not interfere; but if they had rejected it on the ground now stated, they had no power to grant it, the court would interfere so far as to set the jurisdiction of the magistrates in motion, by directing them to hear and determine upon the application. The court therefore granted a rule to shew cause, &c.

“*Park, Taddy and Berens*, now shewed cause against the rule; and first said that the justices in session had heard the application made by counsel on the part of the journeymen millers; but they also admitted that the counsel who opposed it had insisted that by the construction which had been put upon the act of Elizabeth, the discretion of the magistrates in the assessment of wages was confined to labourers and servants in husbandry; and that the sessions had on that ground rejected the application. Upon which Lord *Ellenborough*, C. J., observed, that it was evident that the magistrates had never exercised their discretion at all upon the question, whether the application was fit to be granted, or not; but appeared to have considered that they had no jurisdiction to hear it; therefore they could not be said to have already *heard* the application. . . .

“We do not, however, by granting this mandamus, at all interfere with the exercise of that discretion

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which the legislature meant to confide to the justices of the peace in sessions; we only say that they have a discretion to exercise; and therefore they must hear the application; but, having heard it, it rests entirely with them to act or not upon it as they think fit."

It is clearly demonstrable that the law is settled by the great weight of authority that a court will supervise a lower court to the extent that it will compel it to take jurisdiction where it has erroneously denied its jurisdiction.

Coming now to our own decisions in *State ex rel. Martin v. Superior Court*, 97 Wash. 358, 166 Pac. 630, L. R. A. 1917F 905, we endeavored to show that, in most of the cases where a writ had been denied, it was because of the holding that appeal was an adequate remedy. And we think in all of them the jurisdiction of the court over the subject-matter was not questioned. It may be said that the genesis of all the subsequent confusion and conflict, or apparent conflict, in our own decisions is in the case of *State ex rel. Townsend Gas & Elec. L. Co. v. Superior Court*, 20 Wash. 502, 55 Pac. 933. We have had resort to the original briefs, and can say, in addition to what we said of it in the *Martin* case, that the question put by counsel to the court was not whether a court would compel an inferior court to take jurisdiction of a case where jurisdiction had been disclaimed, but whether the court would compel the satisfaction of a judgment through the process of a contempt proceeding pending an appeal upon the merits. The court was exercising an acknowledged jurisdiction; it had passed on the merits. Its judgment, if ill-founded, rested in error, and the writ was properly denied. There is certainly nothing in the decision when read with the record in mind that makes it an authority against our holding.

Upon the authority of that case, this court refused

in two subsequent cases to compel the superior court to take jurisdiction. *State ex rel. Barbo v. Hadley*, 20 Wash. 520, 56 Pac. 29; *State ex rel. McIntyre v. Superior Court*, 21 Wash. 108, 57 Pac. 352.

Next in order is *State ex rel. Romano v. Yakey*, 43 Wash. 15, 85 Pac. 990. Application was made to a justice of the peace for the issuance of a criminal warrant. The justice denied the warrant upon the false assumption that he had no power to issue the warrant, maintaining under the statutes that his act would be an interference with the duties of the prosecuting attorney. Although the writ was denied because directed to a judge by name, and not to the court, this court said:

"Section 6695, Bal. Code (P. C. § 3114), permits any person to make complaint that a criminal offense has been committed, and if the magistrate to whom the complaint is made wrongfully refuses to act in the matter, we think the party applying for the warrant has a sufficient interest in the performance of the public duty to compel action by mandamus. . . .

"Section 6695, *supra*, under which the application for the warrant in this case was made, provides that complaint may be made to a justice of the peace or judge of the superior court. Had this application been made to the superior court of King county we would find no obstacle in the way of running a writ against that court."

The next case, and one which may be cited as an authority against us, is that of *State ex rel. Piper v. Superior Court*, 45 Wash. 196, 87 Pac. 1120. There the judge of the superior court refused to proceed with the trial of a case. A writ of mandamus was refused. But the case does not rest upon, nor does it do violence to the broad principles which we are asserting. The judge refused to proceed because the service had been made by publication when the law made no provision for such manner of service in that kind of a case. The

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court acted judicially. It adjudged a fact and construed a law. It determined from the record that the statutes providing for the service of the process of the court had not been complied with. This clearly was a matter resting in error and was reviewable by appeal.

In the case of *State ex rel. Murphy v. Superior Court*, 73 Wash. 507, 131 Pac. 1136, the *Piper* case was relied upon as authority. It was distinguished. This case, in our opinion, does not bear directly one way or the other upon the case we have at bar, for the mandamus was sought to compel the court to proceed with the trial of the case, or to enter a judgment of dismissal. The court had to a certain extent exercised its jurisdiction.

It is agreed by all text writers, and has been affirmed by this court, that a writ of prohibition is the counterpart of the writ of mandate. The one is directed to compel action; the other to prohibit it.

In *State ex rel. Wood v. Superior Court*, 76 Wash. 27, 135 Pac. 494, the superior court was proceeding to hear and determine a will contest which had been begun after the time fixed by our statutes for the contest of a will. In other words, the court had no jurisdiction to hear and determine. Proceeding upon the theory that the question raised by the record rested in the definition of that term as a thing absolute, and not as resting in the determination of some fact, or whether the court had obtained jurisdiction of the person through a proper compliance with the statutes providing for the manner of bringing parties into court, or acquiring jurisdiction of a subject-matter admittedly within the jurisdiction of the court, we said:

“It is contended that there is a plain, speedy and adequate remedy by appeal, and for that reason the writ in any event should not issue. But the law ap-

pears to be that, where the court is proceeding with a case without first having acquired jurisdiction, it presents a proper case for the invocation of the writ of prohibition. *White v. Superior Court*, 126 Cal. 245, 58 Pac. 450; *State ex rel. Alladio v. Superior Court*, 17 Wash. 54, 48 Pac. 733; *State ex rel. Mackintosh v. Superior Court*, 45 Wash. 248, 88 Pac. 207. In the case last cited, speaking of the proper function of the writ, it is said: 'The function of a writ of prohibition is to arrest proceedings which are without, or in excess of, jurisdiction, and not to review errors in matters of procedure where jurisdiction exists.' "

But if, after all, it be said with any assurance that we have held to the contrary of our present position, it can be said with the same assurance that we have as often held the other way.

We have not always differentiated between inherent power to hear and power to proceed. This has resulted in a confusion in our decisions. With this distinction preserved, the law is clear. Where there is a lack of inherent jurisdiction in the court itself, a writ of prohibition will lie to restrain it from further proceedings; or where the court has erroneously decided that such inherent jurisdiction is lacking, mandamus will lie to compel it to entertain the cause and to hear and determine. Where, however, the question is whether the court, acting within the scope of its admitted jurisdiction, has acquired jurisdiction over the parties or the particular subject-matter, the writ will not issue. In such a case, the court is exercising its judicial function in passing on the question, not whether it has inherent jurisdiction, but whether it has acquired jurisdiction or a right to proceed within the limit of an admitted jurisdiction. If, in the exercise of its discretion or judgment, it commits error, the proper remedy is by appeal, and not by writ of prohibition or mandamus. Viewed in this light, the decision in the *Piper* case is entirely consistent, for there

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the court did not hold that it lacked jurisdiction inherently, but simply that its jurisdiction had not been properly invoked.

That the court has jurisdiction of the subject-matter of this case and ought to hear the petition of the relator, and enter a judgment upon the issues tendered by the answer of the guardian, we have no doubt. Counsel admits that, prior to the enactment of the probate code of 1917 (Laws 1917, p. 642, ch. 156), the court, acting in probate, had jurisdiction to inquire into the sanity of a person who had been adjudged to be insane. Rem. Code, § 1671, which was repealed by the act of 1917, reads as follows:

“Whenever the court shall receive information that such ward has recovered his reason, he shall immediately inquire into the facts, and if he finds that such ward is of sound mind, he shall forthwith discharge such person from care and custody; and the guardian shall immediately settle his accounts and restore to such person all things remaining in his hands belonging or appertaining to such ward.”

The act of 1915, Rem. Code, § 5967, providing for the commitment of insane persons, provides:

“Whenever in the judgment of the superintendent of any hospital for the insane any person in his charge shall have so far recovered as to make it safe for such patient and for the public to allow him to be at large, the superintendent may parole such patient and allow him to leave such hospital, and whenever in the judgment of the superintendent any patient under his charge has become sane, mentally responsible and probably free from danger of relapse or recurrence of mental unsoundness, the superintendent shall discharge such patient from the hospital.”

In the same section, it is provided that a judge of the superior court may recommit any person who has been paroled by the superintendent of the hospital.

The superior courts of this state are courts of gen-

eral jurisdiction. They have power to hear and determine all matters, legal and equitable, and all special proceedings known to the common law, except in so far as these powers have been expressly denied. The power of the court to discharge a person committed as insane did not depend upon the statute which has been repealed. The court had inherent jurisdiction independent of statute.

The power of a court to discharge or commit an insane person is an inherent power of a court of equity. It is derived *ex necessitate* from the commonwealth. It rests in the sovereignty just as it rested in the King at common law; and is exercised now by a court of equity just as it was then exercised through the courts of chancery. If the power is bestowed upon another tribunal or person, it does not follow that the court is deprived of its jurisdiction. For the same reason of necessity, it is held that the granted jurisdiction is cumulative and concurrent with that of a court of chancery. *In re Sall*, 59 Wash. 539, 110 Pac. 32, 626, 140 Am. St. 885; 14 R. C. L. 554-556; 22 Cyc. 1120.

That the superior court has such general powers has been held in the following cases: *Moore v. Perrott*, 2 Wash. 1, 25 Pac. 906; *Krieschel v. Board of Com'rs, Snohomish County*, 12 Wash. 428, 41 Pac. 186; *Filley v. Murphy*, 30 Wash. 1, 70 Pac. 107; *Reformed Presbyterian Church v. McMillan*, 31 Wash. 643, 72 Pac. 502; *In re Sall, supra*; *In re Ostlund's Estate*, 57 Wash. 359, 106 Pac. 1116, 135 Am. St. 990; *Sloan v. West*, 63 Wash. 623, 116 Pac. 272; *Alaska Banking & Safe Deposit Co. v. Noyes*, 64 Wash. 672, 117 Pac. 492; *State ex rel. Keasal v. Superior Court*, 76 Wash. 291, 136 Pac. 147; *In re Martin's Estate*, 82 Wash. 226, 144 Pac. 42; *Ritchie v. Trumbull*, 89 Wash. 389, 154 Pac. 816.

If this be so, it follows that the repeal of § 1671 did not in any way affect the jurisdiction of the court to

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inquire into the sanity of a person who may be committed or paroled.

The power of the court to act independently of the statute is really confessed by counsel, for he grants that the court would have power to hear the issues tendered by the petitioner if he had brought a *habeas corpus* proceeding. If the court, under its general equity powers, has jurisdiction over insane persons, the remedy or procedure is a matter of secondary consideration; for a court of equity has power not only to decree, but to enforce its decrees in its own way, in the absence of a definite procedure. We so held in *In re Sall, supra*, where we upheld the appointment of a guardian for the estate of a nonresident ward in the absence of any statute or procedure.

In the case at bar, Andrews was not confined to the hospital, but was out on a parole granted by one of the judges of the superior court of King county; and although it might be held that, when an insane person is confined and in charge of the superintendent of a hospital, he might be required, in the interest of a more orderly procedure, to claim his exemption from restraint by first applying to the superintendent of the hospital, it should not be held when the petition shows that the patient is not so restrained, but is at large under a parole issued by the committing court.

No other question in the case was considered by respondent. We will not therefore anticipate them pending an appeal after a trial upon the merits.

The writ will issue.

ELLIS, C. J., and HOLCOMB, J., concur.

MOUNT, J. (dissenting)—I cannot agree that this is a case for the issuance of the writ of mandate. Our statute provides, at Rem. Code, § 1014, that the writ,

“may be issued by any court, except a justice’s or a police court, to any inferior tribunal, . . . to com-

pel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station, . . .;”

and, at § 1015:

“The writ must be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law.”

This court, in *State ex rel. Müller v. Superior Court*, 40 Wash. 555, 82 Pac. 875, 111 Am. St. 925, 2 L. R. A. (N. S.) 395, laid down the rule, in accordance with the statute, that these extraordinary writs would not issue in cases where there was a plain, speedy and adequate remedy by appeal. We there said:

“We again announce the rule that the adequacy of the remedy by appeal, or in the ordinary course of law, is the test to be applied by this court in all applications for extraordinary writs, and not the mere question of jurisdiction or lack of jurisdiction; and that the adequacy of the remedy by appeal does not depend upon the mere question of delay or expense. There must be something in the nature of the action or proceeding that makes it apparent to this court that it will not be able to protect the rights of the litigants or afford them adequate redress, otherwise than through the exercise of this extraordinary jurisdiction.

“We desire to say in conclusion that the court is declaring no new rule at this time. The rule now adhered to has been the established one in this court since the decision in *State ex rel. Townsend Gas etc. Co. v. Superior Court*, *supra*, and ever since the announcement of that decision the court has uniformly treated the cases cited by the relator as overruled. To avoid further misunderstanding, the cases of *State ex rel. Cummings v. Superior Court*; *State ex rel. Campbell v. Superior Court*; *State ex rel. Allen v. Superior Court*; and *State ex rel. Stockman v. Superior Court*, *supra*, and all other decisions of this court which make the question of the jurisdiction of the court below the sole test of jurisdiction in this court, on applications of this kind, are hereby overruled.”

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It was stated there, in language as apt as may be readily conceived, that these extraordinary writs will not be issued where there is a plain, speedy or adequate remedy by appeal, and we have steadfastly, since that time, held to that rule, with the possible exception of cases where the court has erred in granting or refusing to grant a change of venue; and in those cases we have held that the remedy by appeal was inadequate, and for that reason alone have issued writs of mandamus and prohibition. It is not claimed in this case, and cannot reasonably be claimed, that the relator here does not have an adequate remedy by appeal. As stated in the majority opinion, Mr. Andrews was adjudged to be insane. His wife was appointed guardian of his person and estate. Afterwards, Mr. Andrews was paroled to the care of his daughter, who filed an application in the lower court, alleging that his reason had returned and praying the court to adjudge him again sane and to order the guardian to turn his property over to him as a sane person. In answer to this petition, Mrs. Andrews filed a demurrer, and upon the hearing of that demurrer, the trial court construed a statute (Rem. Code, § 5967) to mean that the superior court did not have jurisdiction to determine whether the insane person was restored to sanity, and for that reason sustained the demurrer and was about to dismiss the petition.

If we may assume that the trial court erred in the construction of the statute referred to, and because of that error dismissed the application, or was about to do so, it is clear that the relator has as plain, speedy and adequate a remedy by appeal as in any other case. Suppose that the simplest form of action is brought upon a promissory note. Suppose the defendant demurs to the complaint upon the ground that the court

has no jurisdiction over the subject-matter. Suppose the court, in ruling upon the demurrer, construes a statute and sustains the demurrer to the complaint, and is about to dismiss the action. Can it be said that the plaintiff in such action has no plain, speedy or adequate remedy by appeal and therefore may review the error by mandamus? I think not. And yet the relator's remedy here is just as plain, just as speedy, and just as adequate as in the supposed case. In *State ex rel. Langley v. Superior Court*, 74 Wash. 556, 134 Pac. 173, where we referred to a former opinion in that same case, 73 Wash. 110, 131 Pac. 482, holding that certain orders could not be reviewed in advance of final judgment, we said:

"The basis of the majority opinion was that the relators had an adequate remedy by appeal. This, indeed, is the true test in all applications for extraordinary writs. *State ex rel. Korsstrom v. Superior Court*, 48 Wash. 671, 94 Pac. 472; *State ex rel. Carrau v. Superior Court*, 30 Wash. 700, 71 Pac. 648; *State ex rel. Egbert v. Blumberg*, 46 Wash. 270, 89 Pac. 708; *State ex rel. Gabe v. Main*, 66 Wash. 381, 119 Pac. 844; *State ex rel. Townsend Gas & Elec. Light Co. v. Superior Court*, 20 Wash. 502, 55 Pac. 933. The authorities are unanimous to the effect that neither a writ of mandate nor other extraordinary writ can be used to perform the office of an appeal to review the judicial action of an inferior tribunal."

There is no showing in this record, and none was attempted upon the oral argument, that any emergency exists, or that there is any danger of any rights or any property being lost by whatever delay may occur upon an appeal, should one be taken; but the relator comes here insisting that the writ should issue nevertheless. If the writ may issue in this case, then it may issue in all cases where a general demurrer which goes to the jurisdiction, either of the person or of the sub-

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ject-matter, is sustained to a complaint. The issuance of the writ in this case again opens the door to appeals by writs of mandamus, and not in the ordinary way. This is what we sought to avoid when we announced the rule in *State ex rel. Miller v. Superior Court, supra*. I agree that the jurisdiction is the power to hear and determine causes. The trial court exercised that power. It decided the case upon a question of law. If that decision was erroneous, it may be reviewed by ordinary appeal. If the decision was right, it disposes of the case. I agree that the office of the writ of mandamus is to compel inferior tribunals to exercise their jurisdiction. The lower tribunal has acted in this case and exercised its jurisdiction. I agree that, prior to *State ex rel. Miller v. Superior Court, supra*, this court had issued writs of mandamus where there was a remedy by appeal. But, as stated in that case, all those decisions were overruled where the question of jurisdiction of the court below was the sole test of jurisdiction in this court, and the quotation from the *Langley* case, *supra*, shows that the rule has been adhered to where there was a remedy by appeal. The general rule in other states may be that errors of this kind may be reviewed by a writ of mandamus, but that is not the rule in this court and we have frequently so held, because the statute of this state controls, and provides that such writs may be issued only where there is not a plain, speedy and adequate remedy by appeal. In the cases referred to in the majority opinion, even in *State ex rel. Martin v. Superior Court*, 97 Wash. 358, 166 Pac. 630, L. R. A. 1917F 905, which was a change-of-venue case, we concluded that there was no plain, speedy, and adequate remedy by appeal, and for that reason writs were issued. I would readily concede in this case that, if there was no adequate remedy by appeal, then it would be a proper case for the

issuance of the writ. I agree, of course, that the extraordinary writ of prohibition or mandamus may be a speedy and easy way of reviewing errors which occur in the trial court, but until the majority opinion becomes the law and reads out of the statute § 1015, as it undoubtedly does, and overrules *State ex rel. Miller v. Superior Court, supra*, and numerous other cases holding to the same effect, I must withhold my concurrence in that practice.

PARKER, J., concurs with MOUNT, J.

[No. 13899. *En Banc*. April 15, 1918.]

AMBROSE FRED COLVIN *et al.*, Respondents, v. DELBERT CLARK, Appellant.¹

LOGS AND LOGGING—CONTRACT—CONSTRUCTION. Where the purchaser of timber agreed to remove and pay for it within five years, the contract providing for monthly payments according to mill scale as it was cut, the contract gave him five years for the removal of the timber, and he was not in default so long as the stipulated payments were made.

SAME—CONTRACT—PERFORMANCE. Where the seller of timber failed on demand to furnish a right of way as agreed, required for the removal of one million feet of the timber, the buyer was entitled to a deduction therefor from the agreed price for all the timber.

APPEAL—REVERSAL—EXTENSION OF TIME. Where the lower court erroneously cancelled a contract for the sale of timber before the expiration of the five years limited for its removal, upon reversal the appellant will be given an extension of time for performance amounting to the difference between the date of the judgment and the date of the expiration of the contract.

Appeal from a judgment of the superior court for Thurston county, D. F. Wright, J., entered August 14, 1916, upon the verdict of a jury rendered in favor of the plaintiffs, after a trial on the merits. Reversed.

¹Reported in 172 Pac. 214.

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Davis & Neal, for appellant.

Thomas M. Vance and Chas. D. King, for respondents.

MOUNT, J.—This appeal is prosecuted by the defendant from a judgment of the lower court in favor of the plaintiff for \$3,369 and also a decree canceling and setting aside a contract entered into between the parties.

The facts are as follows: In April, 1912, the parties to this action entered into a contract as follows:

“This agreement made and entered into this 25th day of April, 1912, by and between Ambrose Fred Colvin, owner of the life estate and the real property hereinafter described, and Anna Colvin, his wife, and Tom Ismay, the duly appointed, qualified and acting guardian of the minor children of the said Ambrose Fred Colvin and Anna Colvin, parties of the first part, and Delbert Clark, party of the second part,

“Witnesseth, that in consideration of the covenants and agreements herein contained and the payments made and agreed to be made as hereinafter specified, the said parties of the first part, subject to the requirements and orders of the superior court of the state of Washington for Thurston county, the parties of the first part hereby sell and convey to the party of the second part, his heirs and assigns, upon the terms and conditions hereinafter specified, all the merchantable fir timber situated and being on the east half of the northeast quarter of section thirty-four and the south half of the northwest quarter and the northwest quarter of the southeast quarter of section thirty-five; also all the fir timber in sections twenty-five and twenty-six; also all the fir timber on the northwest quarter of the southeast quarter of section thirty-five, all in township sixteen, north, of range two, west of W. M.

“Said party of the second part agrees to pay for the said timber the sum of two dollars per thousand feet in the manner hereinafter provided.

“It is agreed that the amount of timber on said land

is 10,825,000 feet, said timber shall be paid for by the party of the second part as the same shall be cut and logged, the mill scale shall be taken for the purpose of determining approximately the amount of timber logged each month, but the amount of timber to be taken and paid for is agreed to be 10,825,000 feet, as aforesaid. All timber logged each month shall be settled and paid for by the party of the second part on the 15th day of the following month until said timber is fully paid for. The party of the second part, his successors and assigns, agree to take and remove said timber and pay for the same as above set forth within five years from the date of this contract.

“In consideration of the above obligations, the orders of the court and other good and sufficient consideration, the said parties of the first part hereby grant to the party of the second part, his successors and assigns, a right of way for the steam logging railroad or wagon road, or both, 50 feet in width, over and across sections 25, 26, 34 and 35, township 16, north, range 2, west W. M., in Thurston county, Wash., commencing on the east line of the northeast quarter of the northeast quarter of said section 25, running thence in a westerly and southwesterly direction, same to cross Scatter Creek at a point not less than 1,000 feet west of the present barn building now situated on the Ignatius Colvin D. L. C., with the right to build all necessary roads for the removal of any timber that might be required by said second party, their successors and assigns, but no cultivated lands shall be crossed by said right of way except at that point where Scatter Creek is crossed.

“The party of the second part, his successors or assigns, will pay for the use and occupancy of said right of way the sum of \$25 per month, beginning as of the date of the execution of this instrument. Said payments shall be made to said Ambrose Colvin during his lifetime if he shall live during the term of this contract, and in case of his death before the expiration of this contract, then to duly appointed representatives of said minors. The term for which said right of way is hereby granted shall be for a period of not less than

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five years, or longer at the option of the party of the second part, his successors or assigns.

“The party of the second part, his successors or assigns will put in and maintain sufficient cattle guards wherever said right of way crosses fences, wherever same are now or may hereafter be built. And the party of the second part will pay for all stock or animals that may be killed or injured by the use of said right of way or as the result of any negligent act of the said second party, and will also put in suitable crossings wherever a road used for wagons crosses said right of way. It is further expressly covenanted and agreed that said first parties, their heirs, successors and assigns, shall not lease, sell or convey or grant any right of way for logging purposes, to any person, company, corporation, over and across said sections 25, 26, 34 and 35, T. and R. aforesaid, for the period of the life of this contract. The sum of two thousand dollars shall be deposited by the party of the second part in the Capital National Bank of Olympia, to the credit of the guardian of the minor children of Ambrose Fred Colvin and Anna Colvin, upon the execution of this contract, and said two thousand dollars, cash, shall be credited to the party of the second part on the last one million feet of timber cut.

“And it is also agreed as a part of the consideration for entering into this contract and for the making of such conveyance and for the sale of such timber, that the second party shall cause to be burned, as provided by law, all slashings on logged off land logged by second party, having due regard for the destruction or damage to this property by fire and of the intention to burn such slashings. The party of the second part shall give to the parties of the first part notice when such slashings are to be burned. And it is further agreed that any damage done by the second party, such as the breaking of fences or the falling of trees in cultivated land, shall be repaired by the second party to the satisfaction of the first party.

“Party of the second part in submitting his monthly scale of timber sawed into lumber shall segregate from timber sawed into lumber that part that is now fallen.

"It is agreed that the parties of the first part shall secure a right of way for the removal of all timber on the northwest quarter of the southeast quarter of section 35, said township and range, and in the event of their failure so to do the party of the second part shall be under no obligations to take said timber on this particular forty-acre tract.

"In witness whereof we have hereunto set our hands this 25th day of April, 1912. . . ."

After this contract was entered into, the appellant proceeded to cut and log the timber therein described. A scale of the logs was kept at the mill, and on the 15th of the following month checks were forwarded to the respondents for the amount of logs cut, until the appellant had paid to the respondents \$12,319.55. In the summer of 1913, after the appellant had substantially finished cutting the logs upon what was called the north side of the tract mentioned in the contract, an action was brought by the respondents to cancel the contract and for a money judgment for the difference between the amount of logs cut upon the north side and the amount of timber which was cruised upon that side. That action resulted in a judgment refusing to cancel the contract, but permitting a recovery of \$3,262.30 against the appellant. This appellant in that case appealed to this court and the judgment was reversed because the court did not make findings of fact. *Colvin v. Clark*, 83 Wash. 376, 145 Pac. 419. That case is still pending.

Thereafter, in July, 1916, this action was brought, the respondents alleging that the appellant had failed to make a proper accounting for the timber or make proper payments for the timber accounted for, and that no proper mill scale had been kept as required by the contract. The respondents further alleged that the appellant had abandoned the contract but was threatening to go upon the premises and take timber there-

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from; and the respondents prayed for a judgment in the sum of \$3,369, and that the contract be rescinded and the appellant restrained from entering upon the land or cutting any more timber. The appellant, in answer to the complaint, admitted the making of the contract, denied that he had abandoned the cutting of timber or that he had refused to account for all the timber, and denied that he had failed to keep a proper mill scale; and alleged as an affirmative defense that, under the contract it was the duty of the respondents to procure a right of way across the southeast quarter of section 35; that he had demanded such right of way; that the respondents refused to furnish it, and for that reason he was not required to pay for the timber upon that quarter section of land. Upon these issues the case was tried to the jury, and a judgment resulted as first above stated.

It is contended by the appellant that the court erred in denying motions to make the complaint more definite and certain and to strike certain portions thereof. It is unnecessary at this time to enter into a discussion of these points, because we are of the opinion that a construction of the contract itself, which we think is plain, determines the controversy between these parties. It will be noticed that the contract provides as follows:

“Said party of the second part agrees to pay for the said timber the sum of two dollars per thousand feet in the manner hereinafter provided.

“It is agreed that the amount of timber on said land is 10,825,000 feet, said timber shall be paid for by the party of the second part as the same shall be cut and logged, the mill scale shall be taken for the purpose of determining approximately the amount of timber logged each month, but the amount of timber to be taken and paid for is agreed to be 10,825,000 feet, as aforesaid. All timber logged each month shall be settled

and paid for by the party of the second part on the 15th day of the following month until said timber is fully paid for. The party of the second part, his successors and assigns, agree to take and remove said timber and pay for the same as above set forth within five years from the date of this contract."

There can be no doubt that it was agreed here between the parties to this action that the amount of timber on the tracts mentioned was 10,825,000 feet. This timber was to be removed within five years from the date of the contract. The contract provided the method and time of payment, namely, "as the same shall be cut and logged." It provided that—

"the mill scale shall be taken for the purpose of determining approximately the amount of timber logged each month, . . ."

It is plain from these provisions that the appellant had five years in which to remove the timber. He was to pay for it as it was removed. A scale was to be made and each month, as the timber was cut, it was to be scaled at the mill, and on the 15th of the following month was to be paid for, until 10,825,000 feet was fully paid for. The evidence in the case shows that, before the contract was entered into, various cruises had been made of the standing timber. It was estimated that there was more than 10,825,000 feet, but the parties finally agreed upon that amount, which was to be taken and paid for. It is clear that the appellant could take this timber from the land at any time within the five years, because no other time was specified. It is also clear that he was required to pay for the timber at two dollars per thousand feet—whether he took it or not—at the end of the five-year period, except in one instance, where if a right of way was not furnished the amount of timber upon that quarter sec-

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tion should be deducted; but otherwise the appellant was required to pay for the 10,825,000 feet.

Some contention is made by the appellant that there was a mutual mistake between the parties as to the amount of timber. There is nothing in this record which would justify this contention. The record is conclusive to the effect that there was a difference of opinion between the scalers who had scaled the standing timber for the parties as to the amount of timber before the contract was entered into; but the parties themselves, after this difference of opinion, agreed that there was 10,825,000 feet, and after that agreement was entered into the parties cannot now be heard to say that there was a mutual mistake.

We also think it is plain from the contract that the appellant was to pay for the timber each month as it was taken off. He was to keep a mill scale which was for the purpose of determining approximately the amount of timber taken. He was required to make payments according to that scale. It is not disputed in this record that he made those payments and that he kept an accurate mill scale. The evidence is conclusive upon that point. The only ground alleged in the complaint for terminating the contract was that the appellant had failed to keep an accurate mill scale of the timber and had failed to pay therefor; but there is no evidence in the record to sustain that allegation of the complaint. In fact, the evidence on the part of the appellant is undisputed to the effect that an accurate mill scale was kept and that payments were made promptly on the 15th of the following month for all the timber taken according to that scale; so that it is apparent that the respondents were not entitled to have the contract canceled or to receive pay for the timber before the expiration of the five-year period.

We are of the opinion, therefore, that the trial court erred in entering the judgment in favor of the respondents and against the appellant, and in canceling the contract before the expiration of the five-year period. The action was brought, as we have seen, a year before the expiration of the time in which the appellant had to remove the timber and to pay therefor. If, as we have seen, the appellant kept an accurate account of the mill scale and paid therefor at the contract price, he was not in default upon his contract, and the lower court was therefore without authority to render any judgment, especially one cancelling the contract.

But it is said by the respondents in their brief that the appellant had abandoned the contract. We find no evidence in the record to sustain this contention. It is true the appellant testified that, upon the north side, there was some timber which he did not intend to take away. It is true the appellant testified that there was more than a million feet upon what is called the south side which he did intend to take away, but that he had made demand for a right of way as provided in the contract, and that the right of way had not been furnished. It is true this demand was made after this action was begun, and the trial court was of the opinion that it was not made in good faith. But if the appellant had complied with his contract—and we think the evidence shows he had, up to that time—he was entitled to demand the right of way and have it furnished according to the terms of the contract; and if it was not furnished he was entitled to deduct the million feet or more from the ten million feet which he had agreed to purchase.

It appears that now the five-year period has elapsed; but after the judgment was entered in this action the contract was canceled by the lower court, and it is plain that, after that time the appellant was bound by that

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judgment until it was reversed, and he had no right to go upon the land to take more timber therefrom. In view of this fact, and in view of the fact that the judgment of the trial court must be reversed for the reasons above stated, it is but just that the appellant should have an extension of time in which to fully perform his contract, which would be the difference between the date of the judgment in this case and the date of the expiration of the contract.

The judgment of the trial court is reversed, and the cause remanded with directions to the lower court to deny the relief prayed for by the respondents, but to grant to the appellant an extension of time within which to complete his contract equal to the time between the date of the decree and the date of the expiration of the contract.

ELLIS, C. J., PARKER, FULLERTON, MAIN, WEBSTER, and HOLCOMB, JJ., concur.

[No. 14248. Department One. April 15, 1918.]

W. E. HUGHES, *Appellant*, v. CALVIN J. CARR,
as Treasurer of Pierce County, et al.,
*Respondents.*¹

TAXATION — DISTRAINT — SALE OF PERSONAL PROPERTY — "DISSIPATED." Part of a stock of goods was not "dissipated or about to be dissipated," within the meaning of Rem. Code, § 9249, authorizing a distraint for taxes, from the fact that it was removed from the storeroom and placed in a storage warehouse when the prohibition law went into effect and it could no longer be used in the business; and the county treasurer would be liable for its unlawful distraint.

PARKER, J., dissents.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered January 8, 1917, upon findings in favor of the defendants, dismissing an action in tort, tried to the court. Reversed.

¹Reported in 172 Pac. 224.

Wesley Lloyd, J. E. Belcher, and Carroll A. Gordon,
for appellant.

Fred G. Remann, Harry E. Phelps, and A. B. Bell,
for respondents.

MAIN, J.—The purpose of this action was to recover the value of certain personal property claimed to have been wrongfully distrained and sold by the county treasurer of Pierce county for the general taxes thereon for the year 1915. The trial of the cause before the court, without a jury, resulted in a judgment that the plaintiff take nothing by the action, and that the defendants have their costs and disbursements. From this judgment the plaintiff appeals.

No statement of facts has been brought to this court, and consequently the facts must be conceded to be as recited in the findings of fact made and entered by the trial court. The controlling facts may be summarized as follows: On March 1, 1915, the appellant was the owner of personal property, including mirrors, bars, glassware, and other articles incidental to the saloon business, which was assessed on April 1st, as of March 1st, 1915, for general taxes. On March 1st, the appellant was possessed of about twenty-five dollars worth of liquors and cigars, constituting his stock in trade. The saloon fixtures consisted of one bar, one back bar, one large mirror, two small mirrors, one steam table, one large painting, and other articles incidental to the business. Owing to the passage of the prohibitory law which was to take effect on and after the 1st day of January, 1916, and on account of the expiration of the appellant's liquor license, which expiration occurred on or about the 1st day of July, 1915, he was unable to continue his business as a retail liquor merchant after the 1st day of July, 1915. On the 9th day of July, 1915, he closed his place of business and caused

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the property above mentioned, except the stock of liquors and cigars, to be placed in a storage warehouse. The liquors and cigars had been disposed of in the regular course of business prior to the 1st day of July. On September 30, 1915, the county treasurer, believing that the property was being, or was about to be, dissipated, caused the same to be distrained for the taxes levied for that year. Thereafter, the property was sold and, as the findings recite, the proceeds of the sale were applied in payment of the taxes for the year 1915 and the costs of the distraint, and "said property was sold at said sale for a sum not greater than the amount of said taxes and costs." The property sold, on the date of the sale, was found to be "of the reasonable and market value of \$100." The amount of the taxes was \$18.75.

The controlling question is whether the property was by the owner being dissipated or about to be dissipated. If it was either being dissipated or was about to be dissipated, the judgment of the trial court must be affirmed. On the other hand, if it was not being dissipated, or was not about to be dissipated, the judgment of the trial court cannot be sustained. We do not understand that it is contended that the sale of the stock of liquors and cigars in the regular course of business, prior to the 1st day of July, 1915, when the liquor license expired, was a dissipation within the meaning of the statute. Rem. Code, § 9249, provides that:

"Whenever in the judgment of the . . . county treasurer personal property is being . . . dissipated or about to be dissipated, the treasurer shall immediately distrain sufficient of said property to pay the taxes upon all the property . . . being dissipated or about to be dissipated, together with all accruing costs with interest, . . ."

The question is finally reduced to this: Was the property dissipated, or was it about to be dissipated, because of the fact that it was removed from the storeroom, in which it was at the time it was assessed, and placed in a storage warehouse. The liquor license having expired on the 1st day of July, and the prohibition law going into effect on the 1st day of January following, the appellant was no longer able to use the property in the business in which it was being used at the time the assessment was made. Instead of removing the property to the warehouse, if it had been permitted to remain unused in the storeroom where it was located at the time of the assessment, it would hardly be contended that it was either dissipated or about to be dissipated within the meaning of the statute. It is difficult to see how its removal to a storage warehouse, when the business could no longer be conducted, would be either a dissipation or a contemplated dissipation of the property. According to Webster's International Dictionary, dissipate means:

"1. To scatter completely; to disperse and cause to disappear;—used esp. of the dispersion of things that can never again be collected or restored."

The placing of the property in the warehouse did not disperse and cause it to disappear. Neither did it place it in a position where it could not again be collected or restored. Under the common and accepted meaning of the word "dissipate," the removal of the property from the storeroom to the storage warehouse, with no other fact showing either dissipation or an intent to dissipate is not sufficient to justify the distraint of the property under the claim that it was either being dissipated or was about to be dissipated. The section of the statute above quoted undoubtedly reposes in the county treasurer a large discretion to determine when property is either dissipated or about

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to be dissipated, and, if the facts were susceptible of a construction that the property was either being dissipated or was about to be dissipated, it would require a clear showing of abuse of this discretion before the court would be justified in disturbing the judgment of the treasurer. In our opinion, the facts stated in the findings cannot be construed as showing that the property was either being dissipated or was about to be dissipated by reason of the fact alone that it was placed in a storage warehouse when it could no longer be legally used in the saloon business.

The judgment will be reversed and the cause remanded with direction to the superior court to enter a judgment in favor of the appellant.

ELLIS, C. J., FULLERTON, and WEBSTER, JJ., concur.

PARKER, J. (dissenting) — If this were an action wherein it was sought to enjoin the county treasurer from selling the property in question to satisfy taxes charged against it, I would be inclined, upon the facts shown, to concur in the view that the treasurer should be restrained from so doing. But to hold that the treasurer is liable in damages for so doing, as the opinion, in effect, holds, is, I think, going too far. Such a holding is, as I view it, in principle, but little short of the holding of a judge of a court liable in damages because he has decided a case erroneously. The treasurer was deciding a matter which the law compelled him to decide. He may have been sufficiently in error to warrant our deciding that his decision was wrong, but that is far short of any sound reason for holding him liable in damages for making such wrong decision. The courts were open to respondent to have the treasurer's decision reviewed before the sale by the simplest kind of suit in equity.

There is no finding of malice or bad faith on the part of the treasurer, in deciding that there was statutory cause for the seizure and sale of respondent's property. I think that there is abundant authority showing that the treasurer is not liable in damages, though his decision be erroneous. See 29 Cyc. 1444 and cases therein cited. The decision of the majority is even more plainly erroneous as to the liability of the sheriff who, of course, was entitled to rely on the treasurer's decision as to the cause for the seizure and sale of respondent's property. Manifestly, it was not the duty of the sheriff to act other than upon the decision of the treasurer.

For these reasons, I dissent.

[No. 14400. Department Two. April 15, 1918.]

L. D. McDERMOTT *et al.*, *Appellants*, v. TOLT LAND COMPANY, *Respondent*, NATIONAL CITY BANK OF SEATTLE *et al.*, *Defendants*.¹

LOGS AND LOGGING—LIENS—DURATION—FORECLOSURE—LIMITATIONS. Rem. Code, §§ 1152, 1138, providing that liens on logs shall not bind the property for more than eight months and that no action to enforce the same shall be commenced thereafter, limits the duration of the lien and the time for commencing suit thereon.

BANKRUPTCY—CLAIMS—PAYMENT—STATUTES. Rem. Code, § 1153, providing for the payment of liens to a receiver or assignee applies only to proceedings in state courts, and not to a trustee in bankruptcy.

LIMITATION OF ACTIONS—TOLLING STATUTE—BANKRUPTCY PROCEEDINGS. The filing of a claim with a trustee in bankruptcy does not toll the statute of limitations relating to the foreclosure of liens, under Rem. Code, § 172, which provides for the tolling of the statute when the commencement of an action is stayed by injunction or statutory prohibition; since the bankruptcy proceedings did not prevent maintenance of the action.

¹Reported in 172 Pac. 207.

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Opinion Per MOUNT, J.

Appeal from a judgment of the superior court for King county, Alston, J., entered April 24, 1917, upon findings in favor of the defendants, in an action to foreclose logger's liens, after a trial on the merits. Affirmed.

H. E. Peck, for appellants.

J. A. Coleman, for respondent.

MOUNT, J.—This action was brought to foreclose laborers' liens against the property of the defendants. Upon a trial of the case, the court denied the plaintiffs any relief and they have appealed from that judgment.

The facts are as follows: The Fisher-Bird Lumber Company was a corporation engaged in the manufacture of lumber. The plaintiffs were employed by that company, and while they were so employed, the name of the company was changed to the Fisher-Sorenson Lumber Company. On January 5, 1915, each of the plaintiffs filed in the office of the auditor of King county a notice of his claim of lien against the property of the company for the amount due for wages within the preceding six months, under the provisions of §§ 1149 and 1150, Rem. & Bal. Code. On February 25, 1915, the Fisher-Sorenson Lumber Company was adjudged a bankrupt. On March 30, 1915, a trustee in bankruptcy was appointed for the company. After the adjudication of bankruptcy, the plaintiffs filed with the referee their respective claims for wages due, and stated therein that said claims were secured by liens already filed. The several claims were allowed by the referee. No funds were available for the payment of the debts of the company, and on March 22, 1916, the mill and the land of the company were sold to the defendant, Tolt Land Company, and the trustee was di-

rected to execute to the latter company a conveyance of the real estate and personal property subject to all incumbrances except certain specified mortgages and vendors' liens. The liens of the plaintiffs were not excepted and their claims have not been paid. The proceeds of the sale were all used to pay the specified incumbrances and the expenses of the bankruptcy proceedings. Thereafter—more than eight months after the filing of the notices of liens—this action was commenced to foreclose the liens. The court concluded from these facts: 1st, that the action was not commenced within the time limited by the statute; and 2nd, that the plaintiffs waived their liens by filing the claims with the referee, and elected thereby to have their claims satisfied from the assets of the bankrupt estate. If the court was correct in either of these conclusions, the judgment must be affirmed.

In view of our conclusion upon the first question presented, it will be unnecessary to discuss the second.

The statute provides, at § 1152, Rem. Code, that—

“Any such lien may be enforced within the same time and in the same manner as mechanics' liens are foreclosed.”

Section 1138 of the mechanics' lien law provides that—

“No lien created by this chapter binds the property subject to the lien for a longer period than eight calendar months after the claim has been filed unless an action be commenced in the proper court within that time to enforce such lien; . . .”

In *Peterson v. Dillon*, 27 Wash. 78, 67 Pac. 397, in referring to this statute, we said:

“The mechanic's lien is altogether a creation of the statute, and is circumscribed by the terms of its own creation. It exists independent of any special contract. Where a contract is entered into by the parties,

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it is not the contract which creates the lien under the statute, but it is the use of the material furnished upon the premises, the putting of it into the building and attaching it to the freehold, which entitled the party furnishing the same to a lien upon the premises to the extent of its value. . . . The statute creates and limits the duration of the lien. When the limit fixed by the statute for the duration of the lien is passed, no lien exists, any more than if it had never been created. The statute gives jurisdiction to the court to foreclose a lien on certain conditions,—the filing of a lien notice, and the commencement of the action within eight months after such notice is filed. If these things are not done, no jurisdiction exists in the court to foreclose the lien.”

In *Davis v. Bartz*, 65 Wash. 395, 118 Pac. 334, we said:

“Since the lien expires by force of the statute unless action be commenced within the statutory time, it is necessary to the pleading and proof of a valid lien that the complaint allege and evidence show that the work was done or materials furnished within that time, or the action cannot be maintained. This necessarily results from the wording of the statute, as construed by this court in a number of decisions. *Rees v. Wilson*, 50 Wash. 339, 97 Pac. 245; *Northwest Bridge Co. v. Tacoma Shipbuilding Co.*, 36 Wash. 333, 78 Pac. 996; . . .”

See, also, *City Sash & Door Co. v. Bunn*, 90 Wash. 669, 156 Pac. 854.

The appellants seek to avoid this conclusion in this case because of Rem. Code, § 1153, which provides—

“Whenever a receiver or assignee is appointed for any person, company or corporation, the court shall require such receiver or assignee to pay all claims for which a lien could be filed under this chapter, before the payment of any other debts or claims, other than operating expenses.”

This statute plainly refers to a receiver or assignee in the state court, and limits the payment of claims to

assets other than operating expenses. There is nothing in the record before us to show that the funds of this company were not exhausted in operating expenses. The inference is that there was not enough property of the corporation to pay the operating expenses and prior claims.

The appellants also argue that the statute was tolled by reason of the bankruptcy proceedings, because the filing of the claims in bankruptcy was equivalent to the commencement of a suit to foreclose. Section 172, Rem. Code, provides—

“When the commencement of an action is stayed by injunction or a statutory prohibition, the time of the continuance of the injunction or prohibition shall not be a part of the time limited for the commencement of the action.”

In the case of *City Sash & Door Co. v. Bunn, supra*, we held that § 1138, requiring an action to foreclose a lien to be commenced within eight months, was not a statute of limitations. We there said: “It ‘limits the duration of the lien.’ ” But if we were to concede that it is a statute of limitations, it is apparent that Rem. Code, § 172, above quoted, is not applicable to this case, because no injunction was issued, and there is no statutory prohibition against the maintenance of a foreclosure action after the bankruptcy proceedings have been instituted. In *In re Smith*, 121 Fed. 1014, the District Court of the United States for the Southern District of New York said—

“This is a motion for leave to sue a trustee. The petitioner proposes to bring an action to foreclose a mechanic’s lien on property of the bankrupt, and desires to join the trustee as the owner of the equity of redemption.

“In my opinion, no leave is necessary to sue a trustee in bankruptcy.”

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And in *In re San Gabriel Sanatorium Co.*, 111 Fed. 892, the United States Circuit Court of Appeals of this district based its decision upon *Bardes v. Hawarden Bank*, 178 U. S. 524, and held that the district court was right in granting leave to the mortgagee to make the trustee in bankruptcy a party defendant to foreclosure proceedings in the state court, and that the district court was right in denying the petition of the trustee in bankruptcy for an injunction to restrain the foreclosure proceedings in the state court. It seems plain from these holdings that these appellants might have brought their action to foreclose their liens notwithstanding the bankruptcy proceeding. They elected not to do so, but permitted the time to expire within which, under the statute above quoted, their liens expired. We are satisfied for this reason that the trial court was right in holding that the action was not begun within the time limited by statute. The judgment appealed from is therefore affirmed.

ELLIS, C. J., HOLCOMB, and CHADWICK, JJ., concur.

[No. 14457. Department One. April 15, 1918.]

W. C. McDORMAN, *Respondent*, v. C. ARTHUR DUNN
et al., *Appellants*, C. E. SVENSEN *et al.*, *Defendants*.¹

CARRIERS—JITNEY BUSES—INJURY TO PASSENGERS—ACTIONS—INSTRUCTIONS. In a passenger's suit for injuries sustained through the concurrent negligence of the drivers of a jitney and an automobile, instructions are not erroneous as rendering the jitney owner liable regardless of whether his negligence was the proximate cause, where they clearly charged that the negligence of the driver of the jitney, or the concurrent negligence of both drivers, must have caused the collision before verdict could be rendered against appellants.

SAME. An instruction is not prejudicially erroneous in requiring of a jitney bus driver the highest degree of care, without qualification by the clause, "consistent with the practical conduct of the business," where the instruction complained of plainly referred to the definition of his duty given in another instruction containing the qualification.

SAME—JITNEYS—INJURY TO PASSENGERS—NEGLIGENCE—EVIDENCE—SUFFICIENCY. In a passenger's suit for injuries sustained through the concurrent negligence of the drivers of a jitney and an automobile, a verdict against the former is sustained, where it appears that the street was wet and slippery, the jitney was not equipped with non-skidding devices, and was being driven at an unlawful and dangerous speed, and just before the accident, it swerved and struck the automobile, and was thrown by the force of the impact a distance of 85 feet.

WITNESSES—IMPEACHMENT—EFFECT. The impeachment of a witness by his testimony given in the police court affects the weight and credibility, and not the competency, of the evidence.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$2,500 for injuries sustained in an automobile collision is not excessive, where plaintiff, a veterinary surgeon, 64 years of age, sustained a cut over the right eye, a broken collar bone, and partial loss of motion of the right arm, was rendered unconscious and from the date of the injury suffered great pain, loss of sleep, and ability to care for himself.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered April 16, 1917,

¹Reported in 172 Pac. 244.

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upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Affirmed.

O. C. Moore and Henry S. Noon, for appellants.

Plummer & Lavin, for respondent.

WEBSTER, J.—On November 2, 1916, the plaintiff, while a passenger upon a jitney owned and operated by defendant Dunn, sustained injuries in a collision between the jitney and an automobile owned and operated by the defendants Svensen. The accident occurred at the intersection of Hamilton street, running north and south, and Mission avenue, running east and west, in the city of Spokane. The intersection of the thoroughfares, which was paved with asphalt, was wet and slippery because of recent rains. The scene of the collision is in a thickly settled residence portion of the city, but outside the fire limits.

This action was brought by the plaintiff against the owner of the jitney, Casualty Company of America, as surety upon the bond executed pursuant to Chapter 57, Laws 1915, and the owners of the automobile; charging that Dunn and the Svensens were jointly and concurrently guilty of negligence which caused the collision, in that both automobiles were operated in a careless and negligent manner and at an excessive and unlawful rate of speed, and in violation of the traffic ordinances of the city of Spokane restricting the rate of speed at the place of the accident to twenty miles per hour. As to the defendant Dunn, it was further charged that the jitney was not equipped with chains or other like devices for the purpose of enabling it to be properly controlled.

The defendants Dunn and the casualty company, answering the complaint, admitted the negligence of the Svensens, but denied all allegations of negligence

upon the part of the driver of the jitney; further pleading an ordinance of the city of Spokane providing that at street intersections, vehicles traveling in a northerly or southerly direction shall have the right of way as against vehicles traveling in an easterly or westerly direction, and that the jitney, at the time of the collision, was proceeding northerly on Hamilton street while the automobile was being driven westerly upon Mission avenue; also, that the accident was wholly the result of the negligence and carelessness of the driver of the Svensen automobile, and was wholly unavoidable in so far as the driver of the jitney was concerned.

The defendants Svensen and wife, for answer, denied all negligence on their part, but admitted the allegations of the complaint charging negligence of the owner and driver of the jitney. No claim of contributory negligence was made—the plaintiff being a passenger upon the jitney.

Upon these issues, the cause was tried to a jury, which returned a verdict in favor of the plaintiff for the sum of \$2,500 against Dunn and the casualty company, exonerating the defendants Svensen and wife from liability. After denying a motion for a new trial, judgment was entered upon the verdict, from which Dunn and the casualty company have appealed.

It is first insisted that the jury was erroneously charged that negligence in the operation of the jitney would render its owner and the bonding company liable regardless of whether such negligence was the proximate cause of the accident. As we read the instructions, this assignment is without merit. Upon this subject the court charged the jury as follows:

“Instruction No. 5. It was the duty of the driver of the jitney towards the plaintiff, being a passenger upon the jitney, to exercise the highest degree of care compatible with the practical operation of the jitney

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at the time and place in question; and if the driver of the jitney exercised that degree of care at the time and place in question, then the owner of the jitney would not be negligent in its operation, and could not be held liable for the result of this collision. But, on the other hand, if the driver of the jitney did not exercise that degree of care *and the accident resulted because of that fact*, then the owner of the jitney would be guilty of negligence and would be liable to the plaintiff for any injuries sustained in the collision, regardless of whether the driver of the other automobile was negligent or not.

"Instruction No. 9. If under the instructions I have given you, you find that the jitney only was operated in a careless and negligent manner, *and that the collision occurred solely because of the negligence of the jitney driver*, then you will find a verdict in favor of plaintiff and against the defendant C. Arthur Dunn, and also against the defendant the Casualty Company of America for the injuries sustained. But, if the verdict exceeds \$2,500, then as against the defendant Casualty Company of America your verdict will be limited to \$2,500. If, however, you find that the collision occurred through the negligence of the driver of the Svensen automobile alone, then your verdict will be in favor of plaintiff and against the defendants Svensen and wife alone. On the other hand, if you find that both the driver of the jitney and the driver of the Svensen automobile were negligent *and the collision resulted in consequence*, then your verdict will be against the defendant C. Arthur Dunn and the defendants, Svensen and wife, and the defendant, the Casualty Company of America."

It is plain from a reading of these instructions, that the jury was clearly and correctly charged that the negligence of Dunn, or the concurrent negligence of Dunn and the Svensens, must have caused the collision, before a verdict could be rendered against the appellants. That is to say, that such negligence and the resulting collision must stand in the relation of cause and effect. This embodies the essential element of proximate

cause. If appellants desired a more technical definition of the doctrine, they should have so requested. The instructions complained of in this respect are commendable in that they are couched in language which is plain, accurate and readily understood by a jury of laymen. *Hellan v. Supply Laundry Co.*, 94 Wash. 683, 163 Pac. 9.

Complaint is next made of the following instruction:

"Instruction No. 8. I charge you that the vehicle operated in a northerly and southerly direction has the right of way against a vehicle operated easterly and westerly, and while the operator of the jitney bus had, under the law, the right of way in crossing Mission Avenue, while he was going in a northerly direction, as distinguished from the right of said Svensen and wife and their driver, this does not mean that the jitney bus driver had the exclusive right to operate said jitney at any rate of speed which said driver saw fit to operate it at, neither would said right of way excuse him from exercising the highest degree of care under the circumstances, and although the jitney bus had the right of way in crossing said intersection of said streets, going in a northerly direction, yet if the driver of said jitney bus saw the automobile running westerly on Mission Avenue approaching the intersection at a high, unlawful, excessive, and dangerous rate of speed, that regardless of any negligence which the driver of the automobile owned by defendants Svensen and wife, was committing, the jitney bus driver, in the exercise of the highest degree of care, should have used every reasonable precaution to prevent said automobile from coming into collision with said jitney bus. in other words, a man cannot, under the law, deliberately run into threatened danger, simply because he has the right of way over a certain street when he is carrying passengers for hire, and is charged with the duty of exercising the highest degree of care."

It is urged that this instruction was erroneous for the reasons: (1) that it imposed upon the jitney driver the unqualified duty of exercising the highest degree

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of care in the operation of the vehicle; that is to say, it did not contain the qualifying clause "consistent with the practical conduct of the business," or language of similar import; (2) that it is so confused and involved as to be unintelligible. As to the last proposition, the instruction, as its own commentary, refutes the criticism. It is sufficiently plain and unambiguous to advise a person of ordinary understanding with reference to the provisions of the right of way ordinance as applicable to the facts of this case, and is a clear and wholesome statement of the law upon the subject. As to the first proposition, if this instruction stood alone, it would be subject to the criticism made. But when taken in connection with other portions of the charge contained in instruction number 5, hereinbefore set out, we are convinced that it was neither confusing nor erroneous. The expressions, "exercise of the highest degree of care" and "is charged with the duty of exercising the highest degree of care," plainly refer to the definition of the duty devolving upon the driver of the jitney embodied in instruction number 5, where the court said:

"It was the duty of the driver of the jitney towards the plaintiff, being a passenger upon the jitney, to exercise the highest degree of care compatible with the practical operation of the jitney at the time and place in question."

It is the settled law of this state that the instructions must be considered as a whole; that although a portion thereof, if standing alone, may be technically erroneous and have a tendency to confuse and mislead the jury, yet it will not constitute prejudicial error, if, when taken in connection with other instructions given, the jury could not have been misled as to the principles of law applicable to the issues. *Farnandis v. Seattle*, 95 Wash. 587, 164 Pac. 225; *Olmstead v. Olym-*

pia, 59 Wash. 147, 109 Pac. 602; *Sudden & Christenson v. Morse*, 55 Wash. 372, 104 Pac. 645; *St. John v. Cascade Lumber & Shingle Co.*, 53 Wash. 193, 101 Pac. 833; *Manhattan Bldg. Co. v. Seattle*, 52 Wash. 226, 100 Pac. 330; *Gray v. Washington Water Power Co.*, 30 Wash. 665, 71 Pac. 206.

In the case of *Firemen's Fund Ins. Co. v. Oregon-Washington R. & Nav. Co.*, 96 Wash. 113, 164 Pac. 765, relied upon by appellants, the instructions were absolutely contradictory and inconsistent, in that in the one instance the jury was told that the defendant must exercise the *highest degree of care consistent with the practical conduct of its business*, while in the other it was told that the defendant need only exercise *ordinary and reasonable care in the light of the attending circumstances and surroundings*. That case has no relation to the principle involved in the present discussion. Here the court fixed the proper standard with reference to the duty devolving upon the jitney driver which was clearly and accurately defined in instruction number 5. The degree of care referred to in instruction number 8 plainly relates to the same degree of care defined in the former instruction, which it was not necessary, though perhaps proper, to repeat.

It is next urged that the evidence is insufficient to sustain the verdict. In this connection it is only essential to say that the principal contest waged before the jury was between Dunn and Svensen, each endeavoring to absolve himself from liability by shifting the burden of the blame upon the other; that there was competent evidence tending to show that the jitney was not equipped with chains or other non-skidding devices; that it was being driven at a rate of speed variously estimated from 25 to 35 miles per hour, and that immediately prior to the collision it swerved or turned toward the left and struck the Svensen auto-

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mobile near the middle of the street intersection; that the force of the impact threw the jitney along and across the street a distance of 85 feet, and when stopped it was turned around facing the opposite direction, the automobile being thrown 75 feet to the opposite side of the street, with its rear wheels upon the curb; that the Svensen automobile was also being driven at a dangerous and reckless rate of speed, estimated at from 25 to 35 miles per hour, and that when approaching the street intersection, neither vehicle slackened speed. Under such testimony it would have been competent for the jury to fix liability upon either or both of the principal defendants. The fact that the Svensens were exonerated affords the appellants no just cause for complaint.

“There may be more than one proximate cause for the same injury. The negligence of different persons, though otherwise independent, may concur in producing the same injury. In such a case, all are liable. They may be held either jointly or severally. The negligence of one is no excuse for that of another.” *Hellan v. Supply Laundry Co., supra.*

Considerable space in the brief is devoted to a discussion of the fact that some of the witnesses had given testimony in the police court which contradicted their evidence in the superior court. Clearly such circumstance affected the weight and credibility—not the competency—of the testimony, which presented a question within the peculiar province of the jury.

Finally, it is insisted that the verdict is excessive. The record discloses that the plaintiff, a veterinary surgeon, was 64 years of age; that he sustained a cut 5 or 6 inches in length over the right eye, extending into the hair, requiring a number of stitches to close the wound; that he was rendered unconscious, the right collar bone being broken resulting in the partial loss

of motion of the right arm; that at the time of the trial, which occurred more than three months after the accident, he could only elevate the right arm to a position at right angles with his body when standing erect; that from the date of the injury the plaintiff suffered great pain in his head, neck and shoulders, was exceedingly nervous, suffered from sleeplessness, and was unable to dress himself without assistance. There was also competent expert evidence tending to show that the injury to the arm and shoulder was permanent. The trial court saw and observed the plaintiff, and heard all of the evidence relating to this subject, and thereafter refused to disturb the verdict. We are not prepared to say that in so doing there was any abuse of discretion. Finding no error, the judgment is affirmed.

ELLIS, C. J., MOUNT, CHADWICK, and HOLCOMB, JJ.,
concur.

[No. 14571. Department One. April 15, 1918.]

*In the Matter of the Estate of M. F. JONES.*¹

WILLS—ATTESTATION—EVIDENCE—SUFFICIENCY. A will is not sufficiently attested within the requirements of Laws 1917, p. 649, § 25, requiring it to be signed by the testator in the presence of two witnesses, who shall subscribe their names in the testator's presence, where it appears that it was not signed in the presence of the witnesses, and was not signed by a witness in the scope of the testator's vision, and the name of one of the witnesses, who never saw the paper, was signed by his wife without his knowledge.

Appeal from an order of the superior court for King county, Mackintosh, J., entered October 29, 1917, in probate, rejecting probate of a will. Affirmed.

H. E. Foster, for appellants.

Karr & Gregory and *H. G. Sutton*, for respondent.

¹Reported in 172 Pac. 206.

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Opinion Per ELLIS, C. J.

ELLIS, C. J.—Appeal from an order of the superior court for King county rejecting probate of a writing purporting to be the last will and testament of M. F. Jones, deceased.

At the time of his death, October 8, 1917, decedent was a resident of King county where he died. He left a widow, Isabella Jones, but no children. The widow, producing a paper purporting to be a copy of his will, was by the court appointed special administratrix pending search for the original. On October 16, 1917, upon the petition of Charles W. Brooks and Marion Johnson alleging that they were named in the will as executors, the court ordered that citation issue commanding Isabella Jones to produce the will in court on October 18, 1917, submit to examination, and show cause why it should not be admitted to probate. At the time stated, she produced a writing dated December 13, 1915, purporting to be the last will and testament of decedent, and a full hearing was had as to its execution.

Mrs. Jean Demar Snyder, whose name appeared as that of a witness, testified, in substance, that, at some time in the fall or winter of 1915, Mr. Jones called at her home, produced the paper, told her it was his will and asked her to sign it which she did; that no one else was present at the time; that Mr. Jones did not sign the instrument in her presence; that she did not know his signature and could not say that it was on the paper when she signed it.

A Mrs. Bassett, wife of William N. Bassett whose name appears as that of the other attesting witness, testified that Mr. Jones came to the back door of the Bassett home and asked for Mr. Bassett; that she told him Mr. Bassett was not at home and he said "I have a paper here to sign;" that she asked him to wait for

her husband's return and he said, "No, I don't think I will wait, you sign it for Mr. Bassett in his name;" that she invited him into the house but he declined, remaining on the back porch while she passed through the kitchen into the dining room where she signed the paper as follows: "Mr. Wm. N. Bassett." She further testified that Mr. Jones did not and could not see her sign the paper because he was on the back porch and the door between the kitchen and dining room was closed; that she did not know whether the name either of Mr. Jones or of Mrs. Snyder was on the paper at the time as it "was not opened up;" that she did not know what the paper was until she returned it to Mr. Jones when he told her it was his will. She further stated that she did not know his signature and that he never asked her to sign the paper as an attesting witness. There was no one else present when she signed her husband's name.

William N. Bassett, when shown the paper at the hearing testified that he had never seen it before, that though his name appeared upon it he did not sign it, that Mr. Jones never requested him to act as a witness to his will, and that he, Bassett, knew nothing about the matter except what his wife told him one evening on his returning home. There was other evidence touching the mental capacity of the decedent but we deem it immaterial. This is not an action to contest a will. It is, in substance, an application for probate presenting only the questions of execution and attestation.

The trial court, being of the opinion that the instrument was not so attested as to entitle it to probate as a will, entered the order complained of. The petitioners Brooks and Johnson prosecute this appeal.

The existing statute governing the execution of wills was in force at the date of the death of M. F. Jones.

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It is § 25, chapter 156 of the Laws of 1917, p. 649. So far as here material it reads:

“Every will shall be in writing signed by the testator or testatrix, or by some other person under his or her direction in his *or her* presence, and shall be attested by two or more competent witnesses, subscribing their names to the will in the presence of the testator *by his direction or request.*”

It is in every material particular identical with the prior law, Rem. Code, § 1320, the only change being the addition of the words which we have italicized. The change is immaterial. Both require attestation by the witnesses and “attestation” is “The act of witnessing an instrument in writing, at the request of the party making the same, and subscribing it as a witness.” Bouvier’s Law Dictionary (Rawle’s 3d Revision); Black’s Law Dictionary (2d ed.). Attestation is not a mere form. It has a vital object. That object is to certify that the will was acknowledged in the presence of the witness and that the signature was genuine. *Keely v. Moore*, 196 U. S. 38.

It requires no more than an adversion to the facts to show that neither of the purported witnesses attested the instrument here involved in the manner required by the statute. Though Mrs. Snyder signed in the presence of the decedent and at his request, she did not see him sign it, he did not acknowledge his signature to her, she did not know his signature, she could even not say that his name was on the paper when she signed it.

William N. Bassett, the only other person whose name appears as that of a witness, did not sign the instrument, was never requested to sign it, had never even seen it prior to the hearing. Mrs. Bassett did not sign as a witness, did not intend to sign as a witness, was never even requested to sign as a witness.

She was requested to sign "for Mr. Bassett in his name." There are authorities which hold that a witness *intending* to sign as such, may subscribe in any way intended to identify *himself* as a witness. *In re Walker's Estate*, 110 Cal. 387, 42 Pac. 815, 52 Am. St. 104, 30 L. R. A. 460; 30 Am. & Eng. Ency. Law (2d ed.), p. 601. But the authorities are uniform that the witness must sign *animo attestandi*. *Keely v. Moore, supra*; *Burton v. Brown* (Miss.), 25 South. 61; *Peake v. Jenkins*, 80 Va. 293; *Boone v. Lewis*, 103 N. C. 40, 9 S. E. 644, 14 Am. St. 783; *Moale v. Cutting*, 59 Md. 510.

Moreover respondent contends, and we think soundly, that Mrs. Bassett never signed even her husband's name in the presence of the testator within the meaning of the statute. The act was not within the scope of the testator's vision from his actual position. *Reynolds v. Reynolds*, 1 Speers (S. C.) 253, 40 Am. Dec. 599; *Drury v. Connell*, 177 Ill. 43, 52 N. E. 368; *McKee v. McKee*, 155 Ky. 738, 160 S. W. 261; *International Trust Co. v. Anthony*, 45 Colo. 474, 101 Pac. 781, 22 L. R. A. (N. S.) 1002; *Reed v. Roberts*, 26 Ga. 294, 71 Am. Dec. 210; *In re Downie's Will*, 42 Wis. 66; *Calkins v. Calkins*, 216 Ill. 458, 75 N. E. 182, 108 Am. St. 233, 1 L. R. A. (N. S.) 393. Cases sustaining this view might be cited indefinitely, but inasmuch as Mrs. Bassett did not sign as a witness at all, we shall not further pursue the subject.

There is some doubt as to the appealability of this order, but since all the evidence is here and both sides have requested a decision on the merits, we have entertained the appeal, reserving that question.

Affirmed.

PARKER, WEBSTER, MAIN, and FULLERTON, JJ., concur.

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Opinion Per WEBSTER, J.

[No. 14725. *En Banc*. April 15, 1918.]

THE STATE OF WASHINGTON, *on the Relation of*
Virginia I. Farmer, Plaintiff, v. RALPH C. BELL,
*Judge, etc., Respondent.*¹

JUDGES—CHANGE OF JUDGE—PREJUDICE—TIME FOR APPLICATION.
After requesting a trial judge to try a cause to a jury, it is too late to file an affidavit of prejudice and demand that the cause be assigned to another judge for trial.

Application filed in the supreme court March 13, 1918, for a writ of prohibition to prevent the hearing of a cause by the superior court for Snohomish county, Bell, J. Denied.

Winter S. Martin, O. T. Webb, and Ray M. Wardall,
for plaintiff.

Jesse H. Davis, for respondent.

WEBSTER, J.—This is an original application for a writ of prohibition. The facts are these.

On or about January 1, 1918, a petition entitled: "In Re the Welfare of Onaneta M. Farmer, Harry C. Farmer and Richard J. Farmer," was filed in the superior court of Snohomish county, and on January 5, 1918, Honorable Ralph C. Bell, one of the judges of said court, made an order committing the care and custody of the minor children named to Eva Farmer, their grandmother, until the further order of the court, upon certain terms therein stated. On March 4, 1918, Virginia I. Farmer, relator herein, as the mother of the children, filed a petition in the same court requiring Eva Farmer to appear and show cause why a rehearing upon the entire cause should not be had and the order rendered on January 5, 1918, be cancelled

¹Reported in 172 Pac. 221.

and set aside, for the reasons set forth in the petition. Thereupon the court entered an order requiring Eva Farmer to appear and show cause on March 11, 1918, why the cause should not be reopened and the matter set down for a jury trial upon the issues raised by relator's petition. Upon the return date fixed, counsel for relator appeared before Judge Bell, sitting as the presiding judge of the juvenile court, and requested that the cause be set down for trial before a jury in accordance with the written demand then on file in the case. Respondent having denied relator's application for a jury trial, set the cause for hearing before himself on March 18, 1918. Whereupon relator filed an affidavit of prejudice pursuant to the statute, and requested that the cause be assigned to another judge for trial, which request was denied. This application is made for a writ prohibiting respondent from hearing and determining the cause.

To state the case is to decide it. Relator submitted her cause to Judge Bell by requesting that the case be tried to a jury. When this matter was determined adversely, she undertook to avail herself of the provisions of the statute relating to a change of judge, on the ground of prejudice. This application was not seasonably made. As was said by Judge Dunbar, in *State ex rel. Lefebvre v. Clifford*, 65 Wash. 313, 118 Pac. 40:

"It is true these orders were not made upon the merits of the case; but the statute does not, by specific provision or by any intendment, limit the right to make the application at any time before the trial on the merits. If literally construed, the right would exist at any time prior to the entering of the judgment. But to place such a construction on the law is to charge the law-making power with an intention to cripple and handicap the courts in their attempted enforcement of the law, to an intolerable extent. Hence the necessity of construction; and construing the law and attempt-

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ing to ascertain its meaning, we cannot conclude that it was intended by the act that a party could submit to the jurisdiction of the court by waiving his rights to object until by some ruling of the court in a case he becomes fearful that the judge is not favorable to his view of the case. In other words, he is not allowed to speculate upon what rulings the court will make on propositions that are involved in the case and, if the rulings do not happen to be in his favor, to then for the first time raise the jurisdictional question."

See, also, *Nance v. Woods*, 79 Wash. 188, 140 Pac. 323; *State ex rel. Stevens v. Superior Court*, 82 Wash. 420, 144 Pac. 539; *State ex rel. Nixon v. Superior Court*, 87 Wash. 603, 152 Pac. 1; *Fortson Shingle Co. v. Skagland*, 77 Wash. 8, 137 Pac. 304.

The correctness of the court's ruling in denying a jury trial may be reviewed upon appeal, and therefore is not before us in this proceeding. The writ will be denied.

ELLIS, C. J., MOUNT, MAIN, PARKER, FULLERTON, HOLCOMB, and CHADWICK, JJ., concur.

[No. 13750. Department One. April 15, 1918.]

IN RE SHILSHOLE AVENUE.

BOLCOM MILLS, INCORPORATED, *et al.*, Respondents,
v. THE CITY OF SEATTLE, Appellant,
EDWIN E. CAMPBELL, Petitioner.¹

JUDGMENT—VACATION—LIMITATIONS. Application under Rem. Code, § 303, for relief from a judgment taken through mistake, inadvertence, surprise or excusable neglect, must be made within one year from the date of the judgment.

SAME—VACATION—LIMITATIONS—PENDENCY OF APPEAL. Where, owing to the pendency of an appeal, the period of one year within which relief might be had for mistake or excusable neglect expires before discovery of the mistake, the supreme court will, upon proper showing, grant leave to apply to the lower court for the vacation of the judgment for the causes set forth in Rem. Code, § 303; since the time of the pendency of the appeal should not be counted as part of the time limited.

ELLIS, C. J., dissents.

Application filed in the supreme court January 23, 1918, for leave to file a petition for the vacation of a judgment upon remittitur, entered by the superior court of King county, French, J. Granted.

Hugh M. Caldwell, Walter F. Meier, and Edwin C. Ewing, for appellant.

William E. Froude and Higgins & Hughes, for respondent.

FULLERTON, J.—The city of Seattle caused a change of grade in certain of its streets and avenues, the change being made necessary by the construction of the Lake Washington canal. To meet the expense of reconstructing the streets to make them conform to the grades established, an assessment was levied upon abutting and adjoining property claimed by the city to

¹Reported in 172 Pac. 338.

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be benefited by the change. Among the property so assessed, were lots 28 and 29, in block 71, of Gilman Park addition to the city of Seattle, then and now the property of one Edwin E. Campbell. Lots in the block named belonging to other owners were also assessed and Campbell, along with these owners, objected to the assessments before the city council. When the assessment roll was brought on for hearing by that body, the objections were overruled, and Campbell, with the other owners, appealed to the superior court. At the conclusion of the hearing in the superior court, a judgment was entered canceling the assessments on all of the lots in block 71 except the assessment upon lot 28. From the judgment of the superior court, the city appealed to this court, where the judgment was affirmed. The record shows that the judgment of the superior court was entered on February 29, 1916, that the opinion of the court affirming the judgment was handed down on February 8, 1917, and that remittitur was forwarded to the superior court on April 11, 1917.

On January 23, 1918, Campbell filed in this court the application now before us, asking leave of this court to petition the lower court for a modification of the judgment. The application was accompanied by an affidavit in which it is averred that lot 28 was in the same situation as other lots in block 71 in so far as the legality of the assessment was concerned, and that the court in fact did order the assessment upon the lot canceled, but that it was not included in the formal judgment entered through mistake and inadvertence; the affidavit further averring that the applicant did not discover the omission until the city had threatened to enforce the assessment after the return of the remittitur from this court.

The city of Seattle opposes the application on the ground that it was not made within a year after the

entry of the judgment in the trial court. Against this the applicant contends, first, that it is an application under § 303 of the code (Rem.), and that there is no limitation as to the time within which an application may be made to relieve from a judgment on the grounds therein recited, notwithstanding there may be a limitation to an application under Rem. Code, §§ 464-473. In support of this position, the applicant cites the case of *Marston v. Humes*, 3 Wash. 267, 28 Pac. 520. It must be conceded that the case as decided holds that, outside of the general statute of limitation, there is no limitation as to the time within which a party may be relieved from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect. It will be seen, however, from an examination of the opinion, that the question was not much considered by the court, as it was "practically conceded by counsel for the petitioner that . . . the court had jurisdiction to enter the order in question, . . ." But if the case is to be taken as authority for the proposition, it has been many times overruled. Since the decision in that case, although without directly referring to it, we have repeatedly held that the limitation of one year prescribed in § 466 of the code fixed the extreme limit within which judgments can be vacated on motion or by petition.

The question was squarely before us in *Keith v. Rose*, 59 Wash. 197, 109 Pac. 810. That was an appeal from a judgment entered in an action brought to recover real property sold under a judgment in a tax foreclosure proceeding which had been vacated on motion after the sale was made and after the limitation of one year. We held the vacation without force, because made after the year had expired and after the court had lost jurisdiction over the subject-matter. In

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the course of the opinion Chief Justice Rudkin used this language:

“Proceedings to vacate a judgment must be instituted under either section 303 or section 464, Rem. & Bal. Code. Under section 303 as originally enacted (Code of 1881, § 109), the application had to be made within a reasonable time, not exceeding five months after the expiration of the term. Terms of court were abolished by the constitution, and the limit with reference to the term was left out of the amendment of February 26, 1891, Laws of 1891, p. 106 (Rem. & Bal. Code, § 303), but the legislature did not thereby intend that such motions should be entertained at any time after judgment. Section 466, Rem. & Bal. Code, fixes the extreme limit beyond which judgments cannot be vacated on motion at one year, and such has been the limitation uniformly applied by this law. *Greene v. Williams*, 13 Wash. 674, 43 Pac. 938; *Denton v. Merchants' Nat. Bank*, 18 Wash. 387, 51 Pac. 473; *Boston Nat. Bank v. Hammond*, 21 Wash. 158, 57 Pac. 365; *Twigg v. James*, 37 Wash. 434, 79 Pac. 959; *Scott v. Hanford*, 37 Wash. 5, 79 Pac. 481.”

To the cases cited by the learned chief justice may be added the following subsequent cases: *State ex rel. Pacific Loan & Inv. Co. v. Superior Court*, 84 Wash. 392, 146 Pac. 834; *Denny-Renton Clay & Coal Co. v. Sartori*, 87 Wash. 545, 151 Pac. 1088; *Davis v. Seavey*, 95 Wash. 57, 163 Pac. 35; *Litzell v. Hart*, 96 Wash. 471, 165 Pac. 393; *Burke v. Bladine*, 99 Wash. 383, 169 Pac. 811; *State ex rel. Northern Pac. R. Co. v. Superior Court*, post p. 144, 172 Pac. 336.

We have no doubt, therefore, that notwithstanding the case relied upon by the applicant, the prevailing rule is that an application for relief from, or for the modification or vacation of, a judgment, whether made under § 303 or under §§ 464-473 of the code, must be made within a year from the entry of the judgment.

A second contention is that the limitation, conceding it to apply to § 303, is not a bar to the present application. From the facts before recited, it will be observed that the judgment was in favor of the applicant, that the opposing party appealed therefrom, that the appeal pended in this court until after the expiration of a year from the date of the entry of the judgment in the superior court, and that the applicant did not discover the inadvertence therein until after it had been remanded on affirmance by this court. It is urged that, because of this condition, either the period of limitation should be held to begin to run from the date of the affirmance of the judgment by this court, or the time during which the cause was pending in the appellate court should not be counted in determining the period of the statute; otherwise a litigant affected by an inadvertent judgment entry may be denied the benefit of the statute. We think there is merit in the contention, especially in view of our holdings on cognate questions. We have held that an appeal from a judgment of the superior court transfers the cause to this court, and that the superior court is without power pending the appeal to vacate, change or modify the judgment. *State ex rel. Mullen v. Superior Court*, 15 Wash. 376, 46 Pac. 402; *Canada Settlers' Loan & Trust Co. v. Murray*, 20 Wash. 656, 56 Pac. 368; *Aetna Ins. Co. v. Thompson*, 34 Wash. 610, 76 Pac. 105; *Inland Nursery & Floral Co. v. Rice*, 55 Wash. 21, 104 Pac. 1117; *Gust v. Gust*, 71 Wash. 75, 127 Pac. 566; *Kawabe v. Continental Life Ins. Co.*, 99 Wash. 214, 169 Pac. 329.

We have held, also, that this court, in the consideration of an appealed cause, must consider it upon the record as made, being without power to open up the cause for the introduction of extrinsic matters or to authorize the trial court to do so while it still retained

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jurisdiction of the cause. *Kawabe v. Continental Life Ins. Co.*, 97 Wash. 257, 166 Pac. 617.

So we have held that a judgment of the superior court, appealed to this court and determined upon its merits, becomes in effect a judgment of this court, and that the trial court is without power after its remand to vacate or otherwise modify it on motion or petition except in such manner as may be necessary to carry out the mandate of this court. *Kath v. Brown*, 53 Wash. 480, 102 Pac. 424, 132 Am. St. 1084; *Richardson v. Sears*, 87 Wash. 207, 151 Pac. 504; *Pacific Drug Co. v. Hamilton*, 76 Wash. 524, 136 Pac. 1144; *State ex rel. Jefferson County v. Hatch*, 36 Wash. 164, 78 Pac. 796; *State ex rel. Wolferman v. Superior Court*, 8 Wash. 591, 36 Pac. 443.

The latter rule is subject to the modification, however, that this court will, upon a proper showing made within the year, grant leave to apply to the lower court for the vacation of a judgment affirmed by this court, for all or any of the causes set forth in § 303 of the code or for any or all of the causes set forth in the chapter of the code included within §§ 464-473. *Post v. Spokane*, 28 Wash. 701, 69 Pac. 371, 1104; *State ex rel. Post v. Superior Court*, 31 Wash. 53, 71 Pac. 740; *Post v. Spokane*, 35 Wash. 114, 76 Pac. 510; *Kath v. Brown*, 69 Wash. 306, 124 Pac. 900; *Kawabe v. Continental Life Ins. Co.*, *supra*.

It is readily seen from these holdings that, if the limitation prescribed in the statute is to be held to run without cessation from the date of the entry of the judgment in the superior court, a party to such a judgment may, without fault of his own, be denied the opportunity, granted him by the terms of the statute, to correct any defect therein. Appeals from judgment, it will be remembered, may be taken by giving oral notice at the time the judgment is rendered, or may

be taken by giving written notice immediately thereafter. Pending the appeal, the respondent therein has no control over it except to see that it is prosecuted with reasonable diligence; he may not during that time, either in the court of original jurisdiction or in the appeal court, move for the vacation or modification. As is shown in the present case and in other cases where rearguments have been found necessary, the appeal may pend for the entire statutory year no matter with what diligence it is pursued. In every case, therefore, when these conditions combine, a respondent who discovers an inadvertence in the judgment materially affecting his interests is, for want of an opportunity, denied the right to have it corrected. It is our opinion that this was not the purpose or intent of the statute. We think it was intended that the remedy should be open for a full year and lost, if lost at all, not by fortuitous circumstances without the control of the party, but by his own omission or neglect. So concluding, we hold that the time during which the appeal was pending should not be counted as part of the time within which the applicant was required to move against the judgment.

It is no answer to this position to say that the applicant himself might have appealed from the judgment. His *prima facie* showing is that he did not discover it in time. Moreover to hold that because he did not appeal he has lost the benefit given him by statute would be a perversion of the statute. The very purpose of the statute is to give an opportunity to correct inadvertences which were undiscoverable at the time of the judgment, or inadvertences existing at the time which the party is excused for failing to discover.

As shown in the case of *Denny-Renton Clay & Coal Co. v. Sartori*, 87 Wash. 545, 151 Pac. 1088, this court denied an application to vacate a judgment after the

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year from the date of the entry of the judgment in the superior court made on the ground of newly discovered evidence, although it appeared that an appeal of the cause had intervened between the entry of the judgment and the date of the application which, had it been taken into consideration, would have shown the application to have been made within the statutory time. As shown in the opinion cited, the application was denied from the bench without a formal written opinion. Whether the question here discussed was suggested at the hearing does not appear. Conceding, however, that it was suggested, we cannot regard the ruling as controlling in the present case.

On the merits of the controversy, there is no denial of the facts set forth in the applicant's affidavit, and as these present a *prima facie* case for relief, we have concluded that the application should be granted. It must be understood, however, that the application is not hereby predetermined. We merely grant to the superior court leave to entertain an application for a modification of the judgment. That court will, in considering it, exercise its own judicial discretion.

Let an order be entered accordingly.

PARKER, WEBSTER, and MAIN, JJ., concur.

ELLIS, C. J. (dissenting).—The application could have been made, and should have been made, to this court for leave to move for correction in the lower court within the statutory period of one year.

[No. 14523. Department Two. April 16, 1918.]

THE STATE OF WASHINGTON, *on the Relation of*
Northern Pacific Railway Company, Plaintiff,
v. THE SUPERIOR COURT FOR KING COUNTY,
King Dykeman, Judge etc.,
*Respondent.*¹

JUDGMENT—VACATION—LIMITATIONS. After the expiration of the time limited by law for the vacation or modification of judgments, the court has no power to entertain an application to correct a judgment and make it conform to the journal entry and the actual judgment ordered to be entered; the only relief for constructive fraud beyond the year being by suit in equity.

JUDGMENT—CONCLUSIVENESS—RES JUDICATA. The denial of an application to modify a judgment, made after the expiration of the year limited for such applications, would not bar a suit in equity for relief on the ground of constructive fraud.

Application filed in the supreme court November 8, 1917, for a writ of prohibition to prevent the vacation of a judgment by the superior court of King county, Dykeman, J. Granted.

C. H. Winders, for relator.

R. S. Pierce, for respondent.

CHADWICK, J.—A judgment was entered on the 26th day of September, 1916, in the case of Northern Pacific Railway Company v. Gottlieb Weibel in the superior court for King county. After a lapse of more than one year, application was made by counsel for Weibel to reopen the judgment and make it conform, as he contends, to an oral stipulation of the parties, which he insists is shown by the minute entry of the clerk made at the time.

The case was settled in court but without trial. The minute entry is as follows:

¹Reported in 172 Pac. 336.

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"Counsel for parties stipulate in open court that a decree be entered awarding to plaintiff title of a strip of land six (6) feet wide adjoining the easterly rail of the plaintiff track and awarding the defendant the remainder of land in controversy."

A form of judgment was prepared by counsel for the Northern Pacific Railway Company. This judgment was "O. K.'d" by counsel for Weibel, and duly entered.

Counsel for respondent, who was counsel for Weibel at the time the judgment was entered, asserts that the property as agreed upon is not as described in the judgment; that he "O. K.'d" the judgment as prepared by counsel for relator assuming that it correctly stated the fact, and as it is evidenced by the minute entry of the clerk. The respondent court, being of the opinion that the judgment was erroneous in that it did not correctly describe the property, and did not in other respects conform to the oral stipulation which the parties had entered into, took the matter under advisement with the announcement that he would vacate and amend the judgment. Whereupon relator made application in this court for an original writ of prohibition.

Relator has demurred to respondent's answer, contending that the court is without jurisdiction to proceed under either § 303 or § 464 of the code. Respondent insists that the court "has inherent power independent of the statute to so modify its judgment entry as to make it conform to the judgment actually entered [rendered], at any time, when to do so will not affect the substantial rights of innocent third persons who have acted on the faith of the entry." *O'Bryan v. American Inv. & Imp. Co.*, 50 Wash. 371, 97 Pac. 241.

Litzell v. Hart, 96 Wash. 471, 165 Pac. 393, is cited.

In that case it is held that, when the original decree is not the decree actually rendered by the court, the court has inherent power to make it conform to the judgment actually rendered.

At common law, a court might, at any time during the term, modify or vacate a judgment to make it conform to the judgment actually rendered. After adjournment of the term, a court was powerless to protect itself from its own errors, or the parties from fraudulent interference in the procuring of judgments. In consequence of the hardships of the common law rule, statutes have been passed in many states providing for a definite time within which courts may vacate or modify judgments. In this state, this may be done by motion or petition, if the matter is called to the attention of the court within one year. *Seattle v. Krutz*, 78 Wash. 553, 139 Pac. 498; *State ex rel. Pacific Loan & Inv. Co. v. Superior Court*; 84 Wash. 392, 146 Pac. 834.

The grounds upon which a judgment may be vacated or modified are fixed by statute. These grounds, in so far as they affect the present proceeding, are “. . . mistake, inadvertence, surprise, or excusable neglect.” Rem. Code, § 303.

But this statute was not ample to do justice in all cases, and consequently this court has held a party may, after the expiration of the time limited by law, file a bill in equity to relieve himself of a judgment where its enforcement would result in inequity. *Anderson v. Burgoyne*, 60 Wash. 511, 111 Pac. 777; *Rowe v. Silbaugh*, 96 Wash. 138, 164 Pac. 923; *Denny-Renton Clay & Coal Co. v. Sartori*, 87 Wash. 545, 151 Pac. 1088. A bill in equity must, however, be founded upon some recognized doctrine of equity jurisprudence. The motion in the instant case, if considered at all, would have

to rest upon the ground of excusable neglect. This is a statutory ground. The application is not timely, and must be denied.

If the entry of the judgment under the circumstances as alleged by the moving party operated as a constructive fraud, the remedy, if any there be, is by bill in equity where witnesses may be called and the matter tried out as in an ordinary suit.

The broad statements of the law contained in the cases cited by respondent are correct if treated as abstract propositions. A court has inherent power to make its judgments conform to the truth, but it does not follow that the legislature may not fix a time beyond which a court may not exercise even an inherent power. Being so limited by statute, the court is without jurisdiction to proceed, either upon its own motion or the motion or petition of a litigant, to vacate a judgment after the expiration of a year. This holding is sustained not only by reference to the statute but by reasons of public policy. It tends to give finality to judgments and to bring litigation to an end. In the *O'Bryan* case the motion was made within the year. The *Litzell* case was an original proceeding, and can be sustained upon the ground, either, that it had been begun within the year, or that it was an original suit in equity.

If Weibel has any rights of which the court ought to take notice, his remedy is in equity. It was suggested in argument that, if this writ issues, Weibel will be barred of all remedy; that our order will be *res judicata*. But this does not follow. The court being without jurisdiction to hear the motion, a judgment would not bind him in a suit upon the merits. It is a rule of law and procedure that one who has mistaken his remedy, and who has not been called upon to affirm an issue of fact or law going to the merits of the case,

can assert his right to a remedy which the law will allow in a subsequent suit.

The writ will issue.

ELLIS, C. J., MOUNT, and HOLCOMB, JJ., concur.

[No. 14680. Department One. April 16, 1918.]

THE STATE OF WASHINGTON, *on the Relation of W. P. Murphy, Plaintiff*, v. HARCOURT M. TAYLOR, *as Judge etc., Respondent*.¹

COURTS—APPELLATE COURTS—JURISDICTION—PROHIBITION. The supreme court has original jurisdiction to issue a writ of prohibition to the superior court where it is proceeding in a matter without or in excess of its jurisdiction; Const., art. 4, § 4, granting original jurisdiction to the supreme court, not being limited to matters in aid of its appellate jurisdiction.

PROHIBITION—TO COURT—JUDGE ACTING AS MAGISTRATE. Where a judge of the superior court acts as a committing magistrate in the case of a person accused of crime, he acts as a judge in the performance of a judicial function, and hence is subject to be restrained by an original writ of prohibition from the supreme court, under Const., art. 4, § 4, authorizing an original writ of prohibition against all state officers.

CRIMINAL LAW — PRELIMINARY COMPLAINT — COMMITTING MAGISTRATE—POWERS OF JUDGE. A superior court judge, sitting as a committing magistrate, has no authority, over objection, to inquire into a charge of gross misdemeanor; in view of Rem. Code, § 46, giving justices of the peace concurrent jurisdiction with superior courts of all gross misdemeanors; and Id., §§ 1925-1928, providing that, when a complaint on such an offense is made before a justice of the peace, the justice shall issue a warrant and proceed to a trial, that the accused is entitled to a trial by a jury which shall determine whether the acts of the accused can be sufficiently punished by the penalties the justice court is empowered to inflict, and that a judge or justice is empowered to issue a warrant for arrest and examination only when the crime charged is in the exclusive jurisdiction of the superior court.

Application filed in the supreme court February 13, 1918, for a writ of prohibition to the superior court for

¹Reported in 172 Pac. 217.

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Opinion Per FULLERTON, J.

Yakima county, Taylor, J., to prevent further proceeding in a criminal case. Granted.

Thos. H. Wilson and Harold B. Gilbert, for relator.

The Attorney General and D. E. Twitchell, Assistant, for respondent.

FULLERTON, J.—On February 2, 1918, one Arthur Garden appeared before the Honorable Harcourt M. Taylor, one of the judges of the superior court of Yakima county, and made complaint that a criminal offense had been committed by one W. P. Murphy. The judge, acting as a magistrate, examined on oath the complainant and the witnesses provided by him, reduced the complaint to writing, caused it to be subscribed by the complainant, and issued a warrant for the arrest of Murphy. The warrant as issued charged Murphy with the commission of an assault upon the person of Garden, an offense denominated and punishable as a gross misdemeanor under the statute. On being brought before the magistrate, Murphy, through his counsel, moved the court to dismiss the complaint and discharge the defendant, basing the motion on the ground that the judge, sitting as a magistrate, was without jurisdiction to inquire further into the offense after it had been determined that the offense committed was a gross misdemeanor. This motion was overruled, whereupon the defendant, specially reserving his motion to the jurisdiction of the magistrate, moved that the cause be transferred to the nearest justice of the peace for further proceedings, basing this motion on the ground that, since the complaint charged a gross misdemeanor a police court had jurisdiction, and that he had the right under the statutes to be put to trial for the alleged offense before such a justice, who alone had authority to transfer the cause to the superior court if it

should be determined on the trial that the punishment which the justice court could impose would be inadequate for the offense. This motion was likewise overruled. The defendant thereupon applied to this court for a writ directed to the judge, prohibiting him from proceeding further in the cause, or in the alternative from proceeding further than to transfer the cause to the nearest justice of the peace for trial. To the application, the magistrate demurred, first for want of jurisdiction in this court to issue the writ demanded, and second, for want of sufficient facts. The cause is now before us on the questions suggested by the application and the demurrer thereto.

On the jurisdictional question, it is first urged that this court is without power to issue a writ of prohibition other than in aid of its appellate or revisory jurisdiction, and that this writ is not sought in aid of either. The power of this court to issue writs of prohibition is derived from the constitution. Section 4 of article 4 of that instrument grants to this court "original jurisdiction in habeas corpus and quo warranto and mandamus as to all state officers," and "power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari, and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction." The power to issue writs of prohibition must of course be found in the latter of these clauses. From that clause it might be concluded, as a matter of first impression, that the power was restricted to instances where the writ was found necessary in aid of the court's appellate and revisory jurisdiction; but we early held that such was not its meaning. In *State ex rel. Amsterdamsch Trustees Kantoor v. Superior Court*, 15 Wash. 668, 47 Pac. 31, 55 Am. St. 907, 37 L. R. A. 111, the writ was sought to prohibit a superior court from proceeding in a matter thought to

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be without and in excess of its jurisdiction, and it was contended that the court was without power to issue the writ because of the reason here suggested. The court held, however, that the qualifying clause was not intended to restrict or limit its power to issue the writs specifically enumerated, but was intended rather to confer on the court power to issue writs other than those specifically enumerated which might be found necessary to a complete exercise of its appellate and revisory jurisdiction. In the course of the opinion, it was pointed out that to restrict the power as therein sought would leave the power of no practical value, as it is "difficult to conceive a case in which it would be necessary to issue the writ solely" in aid of a court's appellate or revisory jurisdiction. Subject to the restriction that writs of this sort will only be issued to restrain the exercise of an unauthorized judicial or quasi judicial act (*State ex rel. Bennett v. Taylor*, 54 Wash. 150, 102 Pac. 1029), the case has not been departed from; but, on the contrary, announces the principle upon which this court has issued the writ in the numerous instances found in our records where no question of aiding its appellate or revisory jurisdiction was involved.

A second objection is that the writ will not lie against the judge of the superior court when sitting as a magistrate. The argument is that the judge of the superior court when sitting as a magistrate acts in a special capacity, and is not an officer against whom an original writ will lie from this court. The precise question seems never to have been determined by us. The nearest approach to it is perhaps the case of *State ex rel. Romano v. Yakey*, 43 Wash. 15, 85 Pac. 990, where a writ of mandamus was sought from this court to compel a judge of the superior court to entertain as a magistrate a complaint made before him charging

the commission of a crime, jurisdiction over which he had declined. Among the objections urged against the issuance of the writ was that this court was without jurisdiction, since a magistrate is not of the class of officers against whom it has original jurisdiction to issue the writ. The application for the writ was denied on other grounds urged, thus rendering it unnecessary to pass upon the particular objection, but the question was noticed in the course of the opinion, the court saying that the jurisdiction might be questioned. Notwithstanding this seeming dissent from the view, we are constrained on further consideration to hold that the writ of prohibition will lie from this court when the officer sought to be prohibited is a judge of the superior court. The examination of a person charged with crime is something more than the exercise of a mere ministerial function. It includes an accusation, a warrant of arrest, an examination of witnesses, a finding of the probable guilt or innocence of the accused; and results in an order either discharging the accused or binding him over to the proper court to answer for the offense. The exercise of these functions is plainly the exercise of judicial functions; *State ex rel. Long v. Keyes*, 75 Wis. 288, 44 N. W. 13; *Ex parte Gist*, 26 Ala. 156; *Beiser v. Scripps-McRae Pub. Co.*, 113 Ky. 383, 68 S. W. 457; and being so, the acts are within the office of a writ of prohibition. *State ex rel. Bennett v. Taylor, supra*.

The power to inquire into accusations of crime is, we think, an attribute of the office held by the officer empowered to so inquire, rather than an attribute of the individual who happens for the time being to be the occupant of the office. True, the statute conferring the power uses the terms "justice of the peace" and "judge of the superior court" in designating the officers vested with the power, but to say that the justice

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or the judge when conducting the inquiry acts in a capacity different from his capacity as a justice of the peace or judge of the superior court is to say that the statute is nothing more than a convenient means of designating the individuals who may conduct the inquiry. We think the statute something more than this; we think it confers upon the office which they hold additional duties to be exercised by them in virtue of their powers as such officers. In other words, when a justice of the peace or a judge of the superior court conducts such an inquiry, he acts as such judge or justice of the peace, not in another and different capacity. Applying the rule to the specific case, it must follow that, when the judge of the superior court of Yakima county proceeded to inquire into the offense charged against the relator, he proceeded in his capacity as judge of such court, and is subject to be restrained by an original writ from this court as much so as he would be were he exercising any other of his judicial functions.

Perhaps the point can be made more clear by another consideration. It is not denied, of course, that a magistrate, acting as such, may not be restrained by a writ of prohibition when he acts in excess of or without jurisdiction; the contention is that he is not subject to the original jurisdiction of this court, but to the jurisdiction of the superior court. If this contention be sound, we would have the anomaly of a judge of the superior court while sitting in one capacity issuing a writ against himself while sitting in another, or the anomaly of a magistrate against whom no such writ would lie. Manifestly neither of these alternatives should be given effect unless the governing principles are such as to admit of no other construction. We cannot believe they are so.

It remains to inquire whether the magistrate acted in excess of his jurisdiction when he denied the motions of the relator and proceeded to determine whether he was chargeable with an offense within the jurisdiction of the superior court. The question involves a construction of the statutes, and to an understanding of the position of the relator it is necessary to notice those we find to be pertinent. As we have stated, the offense charged against the relator was a gross misdemeanor. Such an offense is punishable, where no specific penalty is fixed by the statute, by imprisonment in the county jail for not more than one year, or by a fine of not more than one thousand dollars, or by both fine and imprisonment. Rem. Code, § 2267. By § 46 of the Code (Rem.) justices of the peace are given concurrent jurisdiction with superior courts of all gross misdemeanors; with the limitation, however, that justices of the peace elected in cities of the first class shall in no event impose a greater punishment for such an offense than imprisonment in the county jail for six months or a fine not exceeding five hundred dollars, and that justices of the peace other than those elected in cities of the first class shall impose no greater punishment than imprisonment in the county jail for a period of thirty days or a fine not exceeding one hundred dollars. The statute relating to the procedure in justices' courts in cases of persons accused of crime provides (§ 1925) that, whenever a complaint on oath in writing is filed with a justice of the peace charging any person with the commission of a crime or misdemeanor of which he has jurisdiction, the justice shall issue a warrant for the arrest of such person and cause such person to be brought forthwith before him for trial. By §§ 1926 and 1927, it is provided that, in all trials for offenses within the jurisdiction of the justice, the defendant or the state, if either so desires,

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may demand a jury, and if the defendant is found guilty the jury or the justice as the case may be shall assess the punishment; "or [§ 1928] if, in their opinion, the punishment they are authorized to assess is not adequate to the offense, they may so find, and in such case the justice shall order such defendant to enter into recognizance to appear in the superior court of the county, and shall recognize the witnesses, and proceed as in proceedings by a committing magistrate." Section 1949, relating to the examination of persons charged with crime, reads as follows:

"Upon complaint being made to any justice of the peace, or judge of the superior court, that a criminal offense has been committed, he shall examine on oath the complainant, and any witness provided by him, and shall reduce the complaint to writing, and shall cause the same to be subscribed by the complainant; and if it shall appear that any offense has been committed of which the superior court has exclusive jurisdiction, the magistrate shall issue a warrant reciting the substance of the accusation, and requiring the officer to whom it shall be directed forthwith to take the person accused and bring him before the person issuing the warrant, unless he shall be absent or unable to attend thereto, then before some other magistrate of the county, to be dealt with according to law, and in the same warrant may require the officer to summon such witnesses as shall be therein named, to appear and give evidence on the examination."

Section 1955 reads:

"If it shall appear that an offense has been committed of which a justice of the peace has jurisdiction, and one which would be sufficiently punished by a fine not exceeding one hundred dollars, if the magistrate having the complaint is a justice of the peace, he shall cause the complaint to be altered, and proceed as in like cases before a justice of the peace . . . and shall, by order, require the defendant and the witnesses to enter into recognizances, with sufficient sureties, to

be approved by the magistrate, for their appearance before such justice at the time and place stated in the order; and such justice shall proceed to the trial of the action as if originally commenced before him."

Stating the substance of these statutes in a more succinct form, it is therein provided, (1) that justices of the peace have concurrent jurisdiction with the superior courts over all cases of gross misdemeanor; (2) that, when a complaint is made before a justice of the peace charging a person with a gross misdemeanor, it is the duty of the justice to issue a warrant for the arrest of the accused and cause the accused to be brought before him for trial; (3) that when the accused is brought before the justice for trial for an offense within the concurrent jurisdiction of the superior court he is entitled as of right to be tried by a jury, and entitled as of right to have the jury determine whether the acts constituting the offense of which he is accused can be sufficiently punished by the penalties the justice's court is empowered to inflict; (4) that a justice of the peace or judge of the superior court when acting as a magistrate, is empowered to issue a warrant for the arrest and examination of a person charged with crime only when the crime charged is within the exclusive jurisdiction of the superior court; and (5) that a magistrate is only empowered to transfer a cause for trial before a justice of the peace when the offense with which the accused is charged is within the exclusive jurisdiction of the superior court, and he finds during the course of the examination that the offense actually committed is one within the jurisdiction of a justice of the peace and one which would be sufficiently punished by the penalties a justice of the peace is empowered to inflict.

It must follow that the respondent, acting as a magistrate, was without authority, over the objection of the

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relator, to inquire into the offense with which the relator is charged. As we have shown, the offense charged against the relator was an offense within the jurisdiction of the justice of the peace, and an offense for which the relator, before he could be bound to answer in the superior court, was entitled to the judgment of a jury whether it could be adequately punished by the penalties a justice's court was empowered to inflict. This remedy the magistrate could not afford him. Moreover, we think the term "exclusive," used in the section of the statute empowering a magistrate to enter upon the examination of persons accused of crime, has a definite meaning. We think it can be given no other meaning than that the offense must be without the jurisdiction, concurrent or otherwise, of a justice of the peace.

It is not here asserted, of course, that a grand jury may not indict for a gross misdemeanor without a trial before a justice of the peace, or that the prosecuting attorney may not file an information directly in the superior court for such an offense without such a trial; we hold only that the power of a magistrate to inquire into offenses is confined to offenses within the exclusive jurisdiction of the superior courts.

These considerations lead to the conclusion that the magistrate was in this instance acting in excess of his powers, and that this particular magistrate is subject to the writs of this court.

Let the writ issue.

ELLIS, C. J., PARKER, MAIN, and WEBSTER, JJ., concur.

[No. 14133. Department One. April 16, 1918.]

VERA HUBBARD, *Appellant*, v. TACOMA EASTERN
RAILROAD COMPANY, *Respondent*.¹

MASTER AND SERVANT—INJURY TO SERVANT—DEFECTIVE APPLI-
ANCES—PROXIMATE CAUSE—QUESTION FOR JURY. Where the death of
a brakeman was caused by the sudden parting of the train, when
the air hose broke and set the brakes, and a defective coupling gave
way under the strain, the defective coupling was a contributing
cause, and it is error to grant a nonsuit on the theory that the
bursting of the air hose was the proximate cause of the accident,
there being evidence tending to show that, if the train had not
parted, the tender of the engine would have been a great factor of
safety in preventing the accident, making the proximate cause a
question for the jury.

Appeal from a judgment of the superior court for
Pierce county, Chapman, J., entered October 2, 1916,
dismissing an action for wrongful death, upon grant-
ing a nonsuit. Reversed.

G. C. Nolte and Gordon & Easterday, for appellant.
Geo. Korte and Herbert S. Griggs, for respondent.

FULLERTON, J.—The appellant's husband was killed
while in the employment of the respondent as a switch-
brakeman. The appellant, conceiving that his death
was caused by the negligence of the respondent,
brought this action to recover in damages therefor.
On the trial she was nonsuited by the court, and ap-
peals from the judgment entered.

On the night of October 13, 1915, the respondent
started a train of empty rock and logging cars from its
Tacoma yards having for its destination a place called
Mineral, a station on its line of railway. On the way
at the various stations, certain of the cars were side-
tracked and others taken on, so that, as the train ap-
proached the station of Kapowsin, it consisted of the

¹Reported in 172 Pac. 222.

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engine and tender, a caboose, and fifty-nine cars. The train was equipped with air brakes and automatic couplers. As the train approached the station last named, on a downgrade of about one per centum, the air hose controlling the brakes burst, causing the brakes to set and lock the train, further causing the coupler between the engine and the first car to part, letting the engine and tender move on and away from the cars. The car next the tender was a flat car, and on this the brakeman killed was standing at the time of the bursting of the air hose. The sudden slackening of the speed of the train caused him to fall forward from the car down onto the tracks between the car and the tender which had moved forward faster than the train approached. He was unable to extricate himself, and the wheels of the car passed over his legs, crushing them, from the effects of which he died in a hospital two days later.

In her complaint, the appellant charged the respondent with negligence in using both a defective air hose and a defective coupler. At the trial, however, she offered no evidence showing or tending to show that the air hose was defective, but in effect conceded that it was not uncommon for such hose to burst even with the best of equipment. As to the coupler, her evidence tended to show that it was defective in that a broken pin had been used on one side of the coupler, being too short to reach through and catch the lower eye thereof, and that the strain put upon it by the sudden locking of the air brakes caused it to split out the only eye by which it was held, thus permitting the engine and tender to part from the train.

The trial court rested its decision on the ground that the proximate cause of the accident was the bursting of the air hose; and as this was not shown to be defective, no recovery could be had, even though the coupler was

defective, since that was a contributing and not the proximate cause of the accident. In so concluding, we think the trial court was in error. The rule, as we have held it to be, is that, where one or more causes combine to produce an injury, any one of them may be termed the proximate cause if it appears to have been the efficient cause. In other words, the rule is that the employer is liable if any one of the cooperating causes of the injury is a culpable act or omission for which the master is responsible. And the rule holds good whether the other causes were defaults for which the master is responsible or were due to some event or condition for which he is not required to answer. *Cole v. Gerrick*, 62 Wash. 226, 113 Pac. 565; *Goe v. Northern Pac. R. Co.*, 30 Wash. 654, 71 Pac. 182; *Hanson v. Columbia & Puget Sound R. Co.*, 75 Wash. 342, 134 Pac. 1058; *Howe v. Northern Pac. R. Co.*, 30 Wash. 569, 70 Pac. 1100, 60 L. R. A. 949; *Ralph v. American Bridge Co.*, 30 Wash. 500, 70 Pac. 1098. If, therefore, the defective pin was the cause of the parting of the train and the parting of the train was the cause of the death of the brakeman, the respondent is liable to answer therefor.

The respondent argues that there was no evidence tending to support the latter contention, and that no such evidence is available; that at most it can be claimed that it is possible the brakeman might not have been injured had the coupler held, and that a mere possibility is not sufficient to charge it with liability. On this branch of the case, the evidence tended to show that the engine tender, when coupled to the train, was some two or two and one-half feet distant therefrom; that the back of the tender was about six feet higher than the top of the flat car on which the injured brakeman was standing; that there is a ladder running up the back of the tender and grab irons on

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each of its sides, and also a pin lever running from one side to the other. While it is possible, of course, that one falling from the end of the car towards the back of the tender might have fallen between the end of the tender and the car, yet it cannot be denied that the tender in place equipped as it was would have been a great factor of safety in preventing the accident; such a factor, indeed, that it seems to us it was for the jury, not the court, to say whether it would or would not in fact have prevented it. Matters of this sort are to be measured by their reasonable probabilities, and if, in the light of all of the circumstances, it is more reasonable to say that the accident would not have happened had the train not parted than it is to say that it would have happened in any event, the question is one for the jury to determine.

The case of *Parmelee v. Chicago, Milwaukee & St. Paul R. Co.*, 92 Wash. 185, 158 Pac. 977, cited and relied upon by the respondent, is not contrary to this conclusion. There the evidence tended to show nothing more than that a defect in the car existed near the place at which the brakeman killed fell off the car; nothing to show what caused his fall, much less that the defect caused it. Here there was a fixed material protection against the happening of such an accident as did happen, which was taken away by the negligent act of the company in using a defective coupling pin. Clearly the cases are not parallel.

In this court, on the argument at bar, the respondent produced a model of the coupler and sought thereby to demonstrate that the pin was intended only to hold the coupler together when open, supporting no strain when properly closed, and argues therefrom that the pin in no manner tended to prevent the engine separating from the train. But aside from the fact, conceded to

be shown, that a strain was put upon it sufficient to tear it out from a very considerable piece of iron, the coupler is not in evidence and its mechanism cannot be now considered. It may be that the jury will find with the contention when presented to it, but the appellant is entitled to meet it by other evidence. We are not authorized to consider it as a factor in the case.

The judgment is reversed and the cause remanded for a new trial.

ELLIS, C. J., PARKER, and MAIN, JJ., concur.

[No. 14322. Department One. April 16, 1918.]

E. F. MILLS, *Appellant*, v. TITLE GUARANTY & SURETY COMPANY, *Respondent*.¹

PRINCIPAL AND SURETY—SURETY COMPANIES—AUTHORITY OF AGENTS—APPARENT AUTHORITY—EVIDENCE—SUFFICIENCY. Local agents of a surety company are as a matter of law without apparent authority to execute a stay bond, where it was in excess of the express authority in their written power of attorney, no inquiry was made as to such express authority, they had no forms for the execution of bonds of that nature, and the bond was prepared by the assured's attorney wholly in typewriting, and some doubt was at first entertained as to their power to execute the bond (ELLIS, C. J., and MAIN, J., dissenting).

Appeal from a judgment of the superior court for Asotin county, Miller, J., entered April 16, 1917, upon the verdict of a jury rendered in favor of the defendant by direction of the court, in an action in tort. Affirmed.

Fred E. Butler and *E. J. Doyle*, for appellant.

C. H. Baldwin, *F. W. Dewart*, and *John C. Applewhite* (*Will H. Fouts*, of counsel), for respondent.

PARKER, J.—The plaintiff Mills seeks recovery of damages for injuries which he claims resulted to him

¹Reported in 172 Pac. 248.

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from the repudiation by the defendant surety company of liability upon a bond purported to have been executed by its agent G. W. Fuller and its attorney in fact E. E. Halsey, residing at Clarkston in Asotin county, on May 24, 1911. The bond purported to be one to secure a stay of proceedings upon appeal from a judgment rendered against the plaintiff Mills in the superior court for Asotin county, and it is claimed by him to have failed to effect a stay of execution because of the surety company's wrongful repudiation of liability thereon. Trial in the superior court for Asotin county with a jury resulted in judgment rendered in favor of the surety company upon a verdict returned in its favor by direction of the court at the close of the plaintiff's evidence. From this disposition of the cause the plaintiff Mills has appealed to this court.

On December 12, 1910, there was rendered in the superior court for Asotin county a money judgment in favor of C. H. Baldwin and against E. F. Mills, this appellant. On April 25, 1911, Baldwin caused an execution to be issued upon that judgment looking to the sale of the property of Mills in satisfaction thereof. The sheriff of Asotin county, acting under the execution levied upon certain lands situated in that county, belonging to Mills, and gave due notice of the sale thereof to be held on May 27, 1911. In the meantime, Mills had appealed from that judgment to this court, but had not filed in the case any bond to stay proceedings thereon. On May 24, 1911, three days prior to the time set for the sale of the land of Mills, he applied to G. W. Fuller, the local agent of the surety company residing at Clarkston, for a bond to stay proceedings under the execution. On that day, a bond was signed by G. W. Fuller as agent and E. E. Halsey as attorney in fact for the surety company, purporting upon its

face to be a bond to secure stay of proceedings upon the judgment rendered against Mills. Upon the day following, he filed the bond with the clerk of the superior court for Asotin county. No demand was ever made by Mills or any one for him that the clerk "issue to the sheriff a certificate that proceedings have been stayed" as provided by § 1727, Rem. Code, for the recall of an execution upon the giving of a stay bond following an appeal. So the sheriff, having no official notice of any stay of proceedings, proceeded to and did sell the land of Mills under the execution on April 27, 1911, in pursuance of the notice theretofore given by him, and filed his return accordingly on that day. Mills did not, within the ten days prescribed by § 591, Rem. Code, nor at any other time, file any objections to the confirmation by the court of the sale so made, nor does the record before us indicate that the sale ever was confirmed by the court, but it at least inferentially suggests to the contrary. On December 20, 1911, this court reversed the judgment rendered against Mills in favor of Baldwin, and remanded the case to the superior court for Asotin county for a new trial. *Baldwin v. Mills*, 66 Wash. 302, 119 Pac. 816. On March 8, 1912, Mills redeemed his land from the execution sale, paying to the sheriff therefor the sum of \$1,726, which he claims as the measure of damages he is entitled to recover in this action. On November 13, 1912, the superior court for Asotin county, as provided by § 1742, Rem. Code, entered a judgment and order of restitution in favor of Mills and against Baldwin, and directed execution to be issued thereon against Baldwin for the amount collected and realized by Baldwin from the execution sale of the land of Mills. Execution was accordingly issued upon that judgment and order and returned by the sheriff, who certified

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that he was unable to find any property belonging to Baldwin subject to execution.

The only claim of error we find it necessary to here notice is that the trial court erred in directing a verdict in favor of the surety company. One of the grounds upon which this disposition of the cause was rested by the trial court was, in substance, that it must be decided, as a matter of law, that the paper signed by Fuller and Halsey as agent and attorney in fact for the surety company, purporting to be a stay bond, was signed without actual or apparent authority on their part, and did not become a binding obligation of the surety company so as to effect a stay of execution, and that, therefore, the repudiation of liability thereon by the surety company was in no sense a legal wrong rendering it liable in damages to Mills.

It is thus rendered necessary to review additional facts touching the question of the authority of Fuller and Halsey to execute such a bond, which facts may be summarized as follows: We have already seen that the trial court directed verdict to be rendered in favor of the surety company at the close of the evidence introduced in behalf of Mills, the plaintiff. We note in this connection that all of the evidence introduced upon the trial was in behalf of Mills, other than two or three papers erroneously admitted in connection with the cross-examination of Mills' witnesses, as claimed by counsel for Mills. These for present purposes we ignore. Fuller, the surety company's local agent at Clarkston, testified, relative to Mills' applying for the bond and its execution on May 24, 1911, in part, as follows:

"Mr. Mills came into the office and wanted to know if I was handling surety bonds. I told him I was. He told me the kind of bond that he wanted. I told Mr.

Mills that I didn't have the authority to write that class of a bond but that I would have to take an application and it would have to go to Seattle to be approved. He then stated, he said, 'Well, I have got to have this within a day or two.' I don't exactly remember the exact time he had to have it in, but it would not give time for it to go to Seattle and back and wanted me to look up my instructions and see if I couldn't write it. So then afterwards why then I finally made up my mind that I would try to furnish him the bond, and then Mr. Mills went back over to Lewiston, I presume to your office, and got a bond and it was drawn up. I didn't draw up the bond. . . . Mr. Mills brought it over with the copy. . . . And then I took it up with Mr. Halsey and asked Mr. Halsey to sign it as attorney in fact and we signed the instrument, and then I went back to the office and gave Mr. Mills the original and forwarded the copy to the office in Seattle. At Mr. Mills' request I sent a letter along at the time, at Mr. Mills' request, asking that I request the company to telegraph back to me immediately if the bond was accepted."

Mills testified as follows:

"Q. You may go ahead and state, Mr. Mills, what was said by you and Mr. Fuller at the time you made application for this bond and what you did in order to secure the bond. A. We had partly two understandings. When I first went over there as to the bond he didn't seem to think he could get it under a few days— . . . You want to know how I finally got the bond? Q. Yes. A. I don't remember saying anything at all about writing to the company. . . . I asked Mr. Fuller for a bond and asked him if he could give a bond. Well, he could, he could give a bond in a few days. I said 'In a few days won't do. I want it to go into effect right now, because my land is up to be sold.' Well, he didn't know, he said he would look and see, and got down some books and looked through them, and he finally concluded if I could give him a surety bond — . . . He said if I could give him a good man on my bond he could do it. So I said I could give Mr.

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Barclay, and I went back to Lewiston and in a short time I came back with Mr. Barclay and also with the bond, and he issued the bond. . . . He said the bond was good as long as he got it with Mr. Barclay's name to this other security. . . . I didn't ask him to write to Seattle whether they would accept it."

This is the substance of the whole of Mills' testimony given upon his direct examination. His cross-examination does not show anything further as to the apparent authority of Fuller and Halsey to execute the bond. Mark A. Reese, the assistant resident managing agent of the surety company for this state at that time, testified that the Clarkston agency of the company was classed as a local agency, and Fuller and Halsey as local agents who were furnished supplies consisting of "envelopes, stationery, application forms, and such bond forms as they were authorized to write," also a rate book and tin sign and a corporate seal; and that such agents had no power to execute a bond of this nature, though he admitted that they had power to execute judicial fidelity bonds to secure the faithful performance of the duties of receivers, trustees, administrators, guardians, etc. It is not claimed that Fuller and Halsey were furnished by the surety company with any forms of bond to secure stay of execution upon appeal, nor that there was any thought, either by Fuller, Halsey or Mills, of executing this bond upon any such form. It is conclusively shown that this bond was prepared wholly in typewriting in the office of Mr. Butler, attorney for Mills, neither Fuller nor Halsey having anything whatever to do with its preparation, and that it was then presented to them for execution. The sign furnished to Fuller and Halsey by the surety company and displayed in the window of Fuller's office had upon it in large letters these words and none other:

WE ISSUE SURETY BONDS

FIDELITY
JUDICIALCONTRACT
OFFICIALTHE TITLE GUARANTY & SURETY
COMPANY,HOME OFFICE, SCRANTON, PENNA.
CAPITAL AND SURPLUS, OVER \$1,000,000.

Immediately upon being advised by Fuller that the bond had been executed and upon the receipt of a copy thereof, the resident state manager of the surety company at Seattle notified both the clerk of the court and Halsey by telegraph that the bond was executed without authority so to do on the part of Fuller and Halsey, and that the surety company denied all liability thereon. This occurred not later than May 26, the day before the execution sale took place. Soon thereafter, the clerk surrendered the bond to the surety company. This was done evidently upon the assumption that the bond was void by reason of having been executed without authority.

It is plain from the evidence that, whatever authority Fuller and Halsey possessed, apart from their alleged apparent authority, was evidenced by a written power of attorney. We ignore the supposed copy of such power of attorney introduced in evidence which counsel for Mills insist was erroneously admitted. However, since counsel for Mills are relying only upon the apparent authority rather than the express authority of Fuller and Halsey, we need not here concern ourselves with the question of their power as actually defined in their written power of attorney. Besides, if Mills were relying upon a power so evidenced, the burden would be upon him to show it, or at least to place the surety company in such position, by demand or otherwise, that it would be compelled to furnish him the information enabling him to show it. The rule of

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law invoked by counsel for Mills is that stated in their quotation from the text of 2 C. J. 573, as follows:

“The true limit of the agent’s authority to bind the principal as between the principal and third persons is the apparent authority with which the agent is invested, and when a third person has ascertained the apparent authority with which the principal has clothed the agent, he is under no further obligation, in the absence of circumstances putting him on inquiry, to inquire into the agent’s actual authority as the presumption is that one known to be an agent is acting within the scope of his authority. The fact that the agent’s apparent authority is different from the actual authority conferred does not relieve the principal of responsibility.”

We are quite unable to see that this rule can avail Mills, in the light of the facts above noticed appearing from evidence introduced in his behalf. The apparent authority of Fuller and Halsey, so far as our present inquiry is concerned, would seem as a matter of course to be only such as would be shown by facts which rendered their authority apparent to Mills, and not other facts which might render their authority apparent to some one else. But even taking all of the facts here shown touching their apparent authority, the contentions made in behalf of Mills would have but little if any support in addition to that which they would have by confining our attention only to facts known to him. The only facts which could possibly lead Mills to believe that Fuller and Halsey had authority to execute this bond, were: (1) Mills’ knowledge, in a general way, evidently the result of hearsay only, that Fuller was the local agent of the surety company; he apparently had no knowledge, even as the result of hearsay, that Halsey had anything to do with the surety company. (2) Mills’ being told by Fuller that he could furnish such a bond, but at first that it would take a

few days to procure it, manifestly conveying to the mind of Mills that it could not be executed there. (3) Mills' seeing Fuller look at "his books," which "books," however, Mills did not see so as to learn of their contents or nature, merely assuming that they were books containing instructions. (4) Mills' seeing the sign above quoted from, displayed in the office of Fuller, but which sign did not evidence any authority on the part of any particular person or persons to execute this or any other kind of a bond for the surety company. (5) The impression of a seal of the surety company upon the bond at the time of its signing by Fuller and Halsey.

The force of these facts as suggesting apparent authority on the part of Fuller and Halsey was bound to be viewed by Mills in the light of the following facts, of which he was manifestly bound to take notice: (1) The necessity of a written power of attorney possessed by Fuller and Halsey and evidencing their authority to execute such a bond; aside from what might be termed common knowledge that agents of insurance and surety companies are given their authority by written appointment, the very manner in which this bond was signed would bring home to Mills the fact that whatever power Fuller and Halsey possessed must have been granted them by a written power of attorney; (2) the fact that Mills made no inquiry as to the written evidence of authority of either Fuller or Halsey; (3) the fact that neither Fuller nor Halsey had any bond forms for the execution of bonds of this nature; and (4) the fact that the bond which was executed was prepared by Mills' own attorney wholly in typewriting and without either Fuller or Halsey having any part in its preparation.

We are of the opinion that the learned trial judge correctly decided, as a matter of law, that the bond

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purporting to be executed by Fuller and Halsey for the surety company was executed without either actual or apparent authority on their part, and that, therefore, it did not become a binding obligation upon the surety company. This being our conclusion, it of course follows that the surety company could not be held liable in damages for its denial or repudiation of liability upon the bond. Some other contentions are made in behalf of both Mills and the surety company, but in view of our conclusion upon the question of the authority of Fuller and Halsey to execute the bond, we need not notice them.

The clerk of the superior court, and also the sheriff, were made defendants in the beginning of this action, but as to them a demurrer to the complaint was sustained and the action dismissed by the trial court. This is claimed to have been erroneous on the part of the trial court, but in view of our conclusion upon the question of the liability of the surety company, it is manifest that neither the clerk nor the sheriff could be held liable. It is, therefore, unnecessary to further notice this claim of error.

The judgment is affirmed.

FULLERTON and WEBSTER, JJ., concur.

MAIN, J. (dissenting)—It seems to me that, under the facts of this case, the question whether the representatives of the local agency had apparent authority to write the bond is one of fact and not of law, and that the trial court erred in treating the question as one of law.

For this reason I am constrained to dissent from the majority opinion.

ELLIS, C. J., concurs with MAIN, J.

[No. 14455. Department One. April 16, 1918.]

FRANK CUSHING *et al.*, Appellants, v. JOHN B. WHITE,
Prosecuting Attorney for Spokane County,
et al., Respondents.¹

CARRIERS — WHO ARE COMMON CARRIERS — TAXICAB COMPANIES. Owners of automobiles driven for hire at so much per hour or trip, having fixed stands for prospective customers, and transporting passengers from place to place, although without any fixed routes, schedules, or rates, and reserving the right to refuse transportation, are common carriers and so subject to regulation under Rem. Code, § 5562-37 *et seq.*

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered January 6, 1917, upon findings in favor of the defendants, in an action for an injunction. Affirmed.

McCarthy & Edge, for appellants.

John B. White and *William C. Meyer*, for respondents.

WEBSTER, J.—This action was brought by appellants to enjoin respondents from enforcing as against them the provisions of chapter 57, Laws of 1915, p. 1227 (Rem. Code, § 5562-37 *et seq.*), entitled,

“An act relating to and regulating common carriers of passengers upon public streets, roads and highways, providing for the issuance of permits; prescribing penalties for violations, and providing when this act shall take effect.”

The trial court found the following facts: That appellants are engaged in what is known as the automobile rent business; that each of them is the owner of an automobile which he drives for hire, either at a charge of so much per trip or so much per hour; that

¹Reported in 172 Pac. 229.

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each of them has a fixed stand where, when not engaged with customers or not otherwise using the car, they are available to prospective customers during many hours of the day and night; that none of them has a fixed route or routes over which they operate their motor cars; that they do not, when engaged by one person for a trip or trips, ever carry any passenger or passengers other than those directed by the original hirer, whether their automobile capacity is exhausted or not; that none of them has or maintains any fixed schedule of rates for the transportation of passengers, either for a single trip or by the hour, and that each of them "do now and have always reserved the right to transport passengers or refuse to transport them whether they are occupied or not occupied with other engagements." Upon these facts the trial court concluded that the business conducted by the several appellants falls within the provisions of the act and is subject to its regulations. A decree was entered accordingly, from which this appeal is prosecuted.

Appellants insist that, under the facts found by the court, they are not common carriers of passengers, hence not within the purview of the act. For the purpose of this opinion, it will be assumed that the statute applies only to common carriers of passengers in motor propelled vehicles. *State v. Ferry Line Auto Bus Company*, 93 Wash. 614, 161 Pac. 467. The sole inquiry, therefore, is whether, under the facts set forth, appellants are such carriers. The precise question thus presented is of first impression in this court, and its importance seems to justify an extended discussion of the authorities.

Carriers may be defined as persons or corporations who undertake to transport or convey goods, property

or persons, from one place to another, gratuitously or for hire; and are classified as private or special carriers, and common or public carriers; the class to which a particular carrier is to be assigned, depending upon the nature of his business, the character in which he holds himself out to the public, the terms of his contract, and his relations generally to the parties with whom he deals and the public. 1 Moore, Carriers (2d ed.), §§ 1 and 2. The books abound with definitions of both common and private carriers from which the distinguishing features may be gathered. Judge Thompson submits the following:

“A common carrier of passengers is one who undertakes for hire, to carry all persons indifferently who may apply for passage. To constitute one a common carrier, it is necessary that he should hold himself out as such. This may be done not only by advertising, but by actually engaging in the business and pursuing the occupation as an employment.” Thompson, Carriers of Passengers, p. 26, note 1.

Redfield in his treatise says:

“It is generally considered that, where the carrier undertakes to carry only for the particular occasion, *pro hac vice*, as it is called, he cannot be held responsible as a common carrier. So, also, if the carrier be employed in carrying for one or a definite number of persons, by way of special undertaking, he is only a private carrier. To constitute one a common carrier he must make that a regular and constant business, or at all events, he must, for the time hold himself ready to carry for all persons, indifferently, who choose to employ him.” Redfield, Carriers and Bailees, § 19.

In Dobie on Bailments and Carriers, at §§ 106 and 107 the author says:

“The private carrier is one who, without engaging in such business as a public employment, undertakes by special contract to transport goods in particular instances from one place to another.

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“The common carrier of goods is one who holds himself out, in the exercise of a public calling, to carry goods, for hire, for whomsoever may employ him.”

This author at § 164 states:

“The same considerations that distinguish the common from the private carrier of goods apply to set apart the common and private carrier of passengers.”

Hutchinson announces the rule in this language:

“Private carriers for hire are such as make no public profession that they will carry for all who apply, but who occasionally or upon the particular occasion undertake for compensation to carry the goods of others upon such terms as may be agreed upon. They are not common carriers because they do not make the carriage of goods for others a business, and do not hold themselves out to the public as ready and willing to carry indifferently for all persons any particular class of goods or goods of any kind whatever.” 1 Hutchinson, Carriers (3d ed.), § 35.

Judge Story observes:

“To bring a person under the description of a common carrier, he must exercise it as a public employment; he must undertake to carry goods for persons generally, and he must hold himself out as ready to engage in the transportation of goods for hire, as a business, not as a casual occupation *pro hac vice*. A common carrier has therefore been defined to be one who undertakes for hire or reward to transport the goods of such as choose to employ him, from place to place.” Story, Bailments, § 495.

Chancellor Kent says:

“Common carriers undertake generally, and not as a casual occupation, and for all people indifferently, to convey goods, and deliver them at a place appointed, for hire as a business, and with or without a special agreement as to price.” 2 Kent, Commentaries, 598.

In vol. 1, *Michie on Carriers*, at page 3, it is said:

“A common carrier of passengers is one who undertakes, for hire, to carry all persons indifferently who may apply for passage.”

In vol. 1, *Moore on Carriers*, at § 4, the author says:

“A private carrier is one who agrees, by special agreement or contract, to transport persons or property from one place to another, either gratuitously or for hire; one who undertakes for the transportation in a particular instance only, not making it a vocation, nor holding himself out to the public ready to act for all who desire his services. Common carriers, however, hold themselves out to carry for all persons indiscriminately.”

In vol. 10, *Corpus Juris*, at § 1, we find:

“A carrier is one that undertakes the transportation of persons or movable property, and the authorities, both elementary and judicial, recognize two kinds or classes of carriers, namely, private carriers and common carriers. A private carrier is one who, without being engaged in such business as a public employment, undertakes to deliver goods in a particular case for hire or reward. While a common carrier has been defined as one that holds itself out to the public to carry persons or freight for hire.”

Passing from the definitions given by the text writers to a few of the pertinent cases, we find the following in which the distinguishing features are applied.

In *McHenry v. Philadelphia, W. & B. R. Co.*, 4 Har. (Del.) 448, it was held that the owners of stage wagons, stage coaches, and railroad cars, who carry goods as well as passengers for hire; wagoners, teamsters and cart men who undertake as a common employment to carry goods for hire, from one town to another; the masters and owners of ships, vessels, steamboats, barge owners, canal boatmen and ferrymen, em-

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ployed in the like business, are all common carriers: the test applied being,

“A common carrier is one who undertakes and exercises, as a public employment, the transportation or carriage of goods for persons generally, from place to place, whether by land or by water, and to deliver them at the place appointed, for hire or reward, and with or without a special agreement as to price.”

In *Fish v. Chapman*, 2 Ga. 349, 46 Am. Dec. 393, it was held that:

“To render one a common carrier his undertaking must be general and for all people indifferently. The undertaking may be evidenced by the carrier’s own notice or practically by a series of acts, by his known habitual continuance in this line of business. He must assume to be the servant of the public, he must undertake for all people. A special undertaking for one man does not render a person a common carrier. One who follows carrying for a livelihood or who gives out to the world in any intelligible way that he will take goods or other things for transportation from place to place, whether for a year, a season, or less time, is a common carrier and subject to all the liabilities of such.”

In *Varble v. Bigley*, 14 Bush (Ky.) 698, 29 Am. Rep. 435, it is said:

“When a person has assumed the character of a common carrier, either by expressly offering his services to all who will hire him, or by so conducting his business as to justify the belief on the part of the public that he means to become the servant of the public, and to carry for all, he may be safely presumed to have intended to assume the liabilities of a common carrier, for he was bound to know that the law would so charge him, and knowing, must have intended it.”

In *Parmelee v. Lowitz*, 74 Ill. 116, 24 Am. Rep. 276, the proprietor of a line of omnibuses and baggage wagons, engaged in carrying for hire, passengers and baggage for all persons choosing to hire, from, to and

between depots, hotels and different parts of the city of Chicago, was held to be a common carrier. The doctrine of this case is expressly reaffirmed in the recent case of *Hinchliffe v. Wenig Teaming Co.*, 274 Ill. 417, 113 N. E. 707.

In *McGregor v. Gill*, 114 Tenn. 521, 86 S. W. 318, 108 Am. St. 919, where it was held that a livery stable keeper who had hired a team and conveyance to a customer for a special occasion, was not a common carrier, the distinction between the two classes is aptly stated in this language:

“The present case bears no likeness to that of *Lawrence v. Hudson*, 12 Heisk [Tenn.] 671, relied on as authority by the plaintiff in error. In that case the defendant was the owner of a line of omnibuses running from Nashville to Edgefield, holding himself out to the public as ready and willing to carry for hire all persons who offered themselves as passengers. This owner was, upon all the authorities a common carrier, and was properly held to the full limit imposed upon one so engaged.”

In that case the court approved this definition of a common carrier:

“A common carrier of passengers is one who undertakes for hire to carry all persons indifferently who may apply for passage. To constitute one a common carrier it is necessary that he should hold himself out to the community as such.”

In *Robertson & Co. v. Kennedy*, 2 Dana (Ky.) 430, 26 Am. Dec. 466, the court of appeals of Kentucky had before it this state of facts: The defendant had been in the habit of hauling for hire, in the town of Brandenburg, for every one who applied to him, with an ox team, driven by his slave; he undertook to haul for plaintiffs a hogshead of sugar, and in the course of transporting it, the slide slipped into the river, whereby the sugar was spoiled. In an action to recover

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against the defendant upon the theory that he was a common carrier, the court held :

“Every one who pursues the business of transporting goods for hire, for the public generally, is a common carrier. According to the most approved definition, a common carrier is one who undertakes, for hire or reward, to transport the goods of all such as choose to employ him, from place to place. Draymen, cartmen and porters, who undertake to carry goods for hire, as a common employment, from one part of a town to another, come within the definition. So also does the driver of a slide with an ox team. The mode of transporting is immaterial.”

The case of *Lloyd v. Haugh*, 223 Pa. St. 148, 72 Atl. 516, 21 L. R. A. (N. S.) 188, is peculiarly applicable here, for the reason that its facts are strikingly similar to those found by the trial court. From the opinion it appears :

“The defendant, an incorporated company, though chartered to do a general warehouse and storage business, does not confine itself strictly to the particular business for which it was chartered, but engages as well in the business of moving household goods in the city of Pittsburg and vicinity. The president of the company, speaking to this point, says in his testimony that general hauling of household goods is one of the particular lines of business in which the company engages, and that it solicits of this kind by public advertisements in various ways, by signs upon its wagons, upon fences, when that is allowed, by cards intended for general distribution, and by the bills and tags used in the course of the business. These advertisements speak for themselves, and unquestionably establish the fact, independent of everything else in the case, that the defendant does hold itself out to the public as engaged in the moving of household goods, thereby inviting employment along this line. None of these advertisements contain a suggestion of limited liability, or that the company will render such service only as it may select its patrons. Notwithstanding this public

committal of the company to a general and indiscriminating service, it is argued that inasmuch as the company claims the right to select those whom it will serve, and because its custom has been and is to discriminate, accepting some and rejecting others, as it may choose, this circumstance makes it a private as distinguished from a common carrier, and exempts it from the obligations and liability which the law imposes on the latter relation. . . . Conceding, however, that such a duty (to carry indiscriminately at established prices) rests upon a common carrier, to claim that one is not a common carrier because he has persistently disregarded this duty and has arbitrarily chosen whom he would serve, notwithstanding he has invited the public generally to apply, is to make a public duty determinable by the pleasure of the individual and not by principle or law. We express a doctrine universally sanctioned when we say, that anyone who holds himself out to the public as ready to undertake for hire or reward the transportation of goods from place to place, and so invites custom of the public, is in the estimation of the law a common carrier. . . . We are dealing with a case where the carrier made the transportation of household goods part of its regular business, advertised that business in a way to solicit custom from the general public. An unavoidable implication arises that it holds itself in readiness to engage with anyone who might apply."

In *Vandalia R. Co. v. Stevens*, 114 N. E. 1001, the appellate court of Indiana observed:

"On the other hand, we cannot agree with the appellant's contention that the common carrier may, by the words of its contract, convert itself into a private carrier, where the transportation undertaken and the duties and responsibilities incident thereto are such as are ordinarily incident to a common carrier."

In *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174, Mr. Justice Strong said:

"We have already remarked, the defendants were common carriers. They were not the less such because

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they had stipulated for a more restricted liability than would have been theirs had their receipt contained only a contract to carry and deliver. What they were is to be determined by the nature of their business, not by the contract they made respecting the liabilities which should attend it. Having taken up the occupation, its fixed legal character could not be thrown off by any declaration or stipulation that they should not be considered such carriers."

In vol. 1, *Michie on Carriers*, at page 3, the author says:

"Persons carrying on a transportation business under circumstances which, in law, constitute them common carriers, cannot divest themselves of that character, nor secure an exemption from its liabilities, by declaring in their bills of lading, etc., that they are not to be deemed common carriers. What they are is to be determined by the nature of their business."

Authorities to the same effect may be cited indefinitely; but from the foregoing it is manifest that a common carrier is one whose occupation is the transportation of persons or things from place to place for hire or reward, and who holds himself out to the world as ready and willing to serve the public indifferently in the particular line or department in which he is engaged; the true test being whether the given undertaking is a part of the business engaged in by the carrier which he has held out to the general public as his occupation, rather than the quantity or extent of the business actually transacted, or the number and character of the conveyances used in the employment. On the other hand, if the undertaking be a single transaction, not a part of the general business or occupation engaged in, as advertised and held out to the general public, then the individual or company furnishing such service is a private and not a common carrier. In either case the question must be determined by the

character of the business actually carried on by the carrier and not by any secret intention or mental reservation it may entertain or assert when charged with the duties and obligations which the law imposes.

An analysis of the findings of the lower court discloses that appellants' calling is characterized by the following features: (a) they are engaged in what is known as the automobile rent business; (b) each of them owns and operates a motor propelled vehicle for hire, either at a charge of so much a trip or so much per hour; (c) each has a fixed stand or place where his car is available to prospective customers during many hours of the day and night; and (d) they transport passengers from place to place. Here we have carriers engaged in transporting persons for hire as a business or occupation, and impliedly and practically holding themselves out to the public as ready and willing to serve indiscriminately all who may desire the use of their facilities. The fact that they have no fixed schedule of charges, do not operate over definite routes, do not upon all occasions load the car to its full capacity, and *reserve* the right to refuse to transport passengers whether their automobile is engaged or not, is wholly immaterial; their character is determined by their public profession, not by undisclosed reservations or secret intentions.

The advent of the automobile as a mode of conveyance has in nowise marked a departure from or modification of the principles of the law of carriers as theretofore defined and applied by the courts. The automobile is but a modern method of transportation to which the settled rules have been extended. Babbitt, in his work, *The Law Applied to Motor Vehicles*, at § 620, observes:

"The motor vehicle is daily coming into increasing use in a commercial capacity. It is already found in

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nearly every line of business. Associations and corporations have been organized with the motor car as a means of transporting both passengers and property as common carriers. . . . The distinction between such carriers and private carriers is that the former holds himself out to all persons who choose to employ him, as ready to carry for hire, while the latter agrees in some special case with some private individual to carry for hire. The common carrier's employment is public, and he is bound to carry the goods and persons of all who demand carriage and who comply with his reasonable terms. . . . The essence of the distinction between the two classes of carriers is that in order to constitute one a *common carrier*, it is necessary that he hold himself out to the public as such. . . . And one may hold himself out as a common carrier not only by advertising, but by actually engaging in the business and pursuing the occupation as an employment."

Huddy on Automobiles (4th ed.), § 39, says:

"An automobile may be used as a common carrier, a private carrier, or a personal private conveyance. Public motor vehicles, such as sight-seeing cars, taxicabs, and others which are employed in carrying all persons applying for transportation, come within the definition that a common carrier of passengers is one who undertakes for hire to carry all persons who may apply for passage. But to constitute one a common carrier it is necessary that he should hold himself out as one."

A person or company engaged in the operation of a jitney bus is a common carrier. *Dresser v. Wichita*, 96 Kan. 820, 153 Pac. 1194, Ann. Cas. 1917C 1045, L. R. A. 1916B 1143; *Memphis v. State ex rel. Ryals*, 133 Tenn. 83, 179 S. W. 631, L. R. A. 1916D 246; *Berry*, Automobiles (2d ed.), § 874; Huddy, Automobiles (4th ed.), § 372.

A taxicab company, following the business of transporting persons for hire and holding itself out as ready

to carry one and all indiscriminately, is a common carrier and subject to all the responsibilities of such a carrier. *Public Service Commission v. Hurtgan*, 91 Misc. Rep. 432, 154 N. Y. Supp. 897; *Donnelly v. Philadelphia & Reading R. Co.*, 53 Pa. Sup. Ct. 78; *Van Hoeffen v. Columbia Taxicab Co.*, 179 Mo. App. 591, 162 S. W. 694; *Carlton v. Boudar*, 118 Va. 521, 88 S. E. 174; *State v. Seattle Taxicab & Transfer Co.*, 90 Wash. 416, 156 Pac. 837; Berry, *Automobiles* (2d ed.), § 887; Huddy, *Automobiles* (4th ed.), § 303; Babbitt, *Motor Vehicles*, § 621.

There is no essential difference in the character of service furnished by the taxicab and that supplied by appellants. They afford similar accommodations, are operated in practically the same manner, and are necessarily governed by the same principles. We conclude that appellants come within the act in question and are subject to its provisions. The judgment is affirmed.

ELLIS, C. J., MOUNT, HOLCOMB, and CHADWICK, JJ., concur.

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Syllabus.

[No. 14580. Department One. April 16, 1918.]

ISLAND GUN CLUB, *Respondent*, v. NATIONAL SURETY
COMPANY, *Appellant*.¹

PRINCIPAL AND SURETY — BOND FOR PERFORMANCE OF CONTRACT — CONSTRUCTION. A bond given to secure the faithful performance of a contract to furnish all labor and material for an improvement, guarantees payment of a subcontractor doing work on the job for which the subcontractor had a lien, although the contract did not expressly provide for a bond to secure performance.

SAME — LIABILITY OF SURETY — PERFORMANCE OF CONTRACT — PROTECTION AGAINST LIENS. Where a bond insuring the performance of a contract required the surety to pay out any money which should be paid to it, "for the protection of all parties in interest," the surety is liable for the amount of the contract price which was paid to it upon a dispute arising, and which it paid to the contractor, after notice that a subcontractor had not been paid and had a claim for a lien exceeding the sum paid over.

RECEIVERS — AUTHORITY — ASSIGNMENTS. General receivers of a foreign surety company have, by virtue of their office, authority to assign to persons to whom the surety company is liable the surety company's rights under an indemnity bond protecting it against the liability; the same not being the assignment of assets, but simply a matter of relieving it from the obligation.

SAME — ASSIGNMENTS — EXECUTION. A receivers' assignment of rights under an indemnity bond, in consideration of a release from liability for the same matter, is sufficient, although signed by their individual names, without official designation, where the body of the assignment referred to the receivers as assignors, and recitals made it plain that they intended to execute it in their capacity as receivers.

TRIAL — OBJECTION TO EVIDENCE — SUFFICIENCY. Upon the offer of a receivers' assignment in evidence, an objection to it as "incompetent, irrelevant, and immaterial," is insufficient to raise the point that the signatures of the receivers had not been proved, where the objection was overruled, "unless there is objection to the form in which it was authenticated," and no further objection was made.

ASSIGNMENTS — PROPERTY ASSIGNABLE — RIGHTS UNDER INDEMNITY BOND. The rights of a surety company under an indemnity bond given to secure application of the proceeds of a contract on which the surety company was liable, is assignable to the owners to whom

¹Reported in 172 Pac. 209.

the surety company was liable, notwithstanding the nonassignability of insurance contracts, in view of the purposes for which the bond was given and that the assignment did not change or affect the liability in any respect.

INDEMNITY—ACTIONS—ACCRUAL—DATE OF LOSS. A right of action upon an indemnity bond given to a surety upon paying over money while the property was subject to a lien, did not accrue until judgment foreclosing the lien, and suit brought thereon within two years is in time.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered September 29, 1917, upon findings in favor of the plaintiff, in an action upon contract. Affirmed.

Roberts, Wilson & Skeel, for appellant.

E. H. Kohlhasse, for respondent.

PARKER, J.—This is an action upon an indemnity bond, executed by L. C. Hall, doing business as L. C. Hall & Company, as principal, and the National Surety Company, as surety, and given to the United Surety Company to indemnify it against damages which it might suffer from the paying over to Hall of the sum of \$985.42, which sum was placed in its hands by the Island Gun Club in pursuance of the terms of an indemnity bond it had executed as surety with Hall as principal to secure the faithful performance of a contract wherein Hall agreed to construct for it certain dikes and drains. Recovery is sought by the gun club upon the theory that it has succeeded to the rights of the United Surety Company under the indemnity bond given to that company by the National Surety Company. Trial upon the merits in the superior court for King county, sitting without a jury, resulted in findings and judgment in favor of the gun club and against L. C. Hall and the National Surety Company in the sum of \$985.42, from which the National Surety Company has appealed to this court.

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Opinion Per PARKER, J.

On May 5, 1910, L. C. Hall, doing business in the name of L. C. Hall & Company, entered into a contract with the Island Gun Club by which he agreed to construct certain dikes and drains for it in Skagit county in accordance with certain plans and specifications, for which it agreed to pay him \$4,750. The contract contained among other provisions the following:

“Said party of the second part (Hall) shall furnish all skill, labor and material required for the complete performance of said improvement, in its each and every detail.”

The contract did not in terms provide for the giving of a bond by Hall as contractor to secure the faithful performance of the work, but on the same day and manifestly in compliance with the understanding of the parties at the time of the signing of the contract Hall executed, as principal, with the United Surety Company, as surety, and delivered to the gun club a bond in the sum of \$4,750 to secure the faithful performance of the contract. This bond was conditioned as follows:

“The conditions of the above obligation are such, that whereas the above bounden principal has entered into an agreement with the above named Island Gun Club for the construction and completion of a dike and box drains on section 25, twp. 33 N. R. 3 E. W. M. near the town of Fir, Washington, according to the terms and conditions of a certain contract entered into the fifth day of May, 1910, which contract is hereby referred to and made a part hereof as fully as if written herein.

“Now therefore, if any notice is served upon the obligee, or if the obligee shall have knowledge that the principal is not meeting its obligations for labor performed or material furnished, then and thereafter all payments made or to be made, under the said contract, shall be made through the surety for the protection of all parties in interest, and that if said principal shall

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faithfully perform said contract according to the terms, covenants and conditions thereof, then this obligation shall be void; otherwise to remain in full force and effect."

Hall, we assume, completed the work, when there remained unpaid upon the contract price the sum of \$985.42. The gun club, having learned that Hall had not settled with the Everett Construction Company, which company had done work for him upon the contract, for which it had a lien upon the land, notified the United Surety Company thereof and paid over to it the balance of \$985.42 due upon the contract, to the end that the same might be held and paid out by it "for the protection of all parties in interest" as provided by the terms of the bond. Thereafter, on November 1, 1910, the United Surety Company paid this \$985.42 over to Hall upon his demand therefor, but before doing so it exacted of and received from him an indemnity bond in the sum of \$985.42, executed by him as principal and the National Surety Company as surety, containing recitals and conditions as follows:

"Whereas, said principal, L. C. Hall & Company, did on the 5th day of May, 1910, enter into a certain contract with the Island Gun Club for the construction of a certain dyke in section 25, township 33 north, range 3 east, W. M. near the town of Fir, Washington, in Skagit county, and

"Whereas, the said principal L. C. Hall & Company, did on the 5th day of May, 1910, give, together with the said United Surety Company, a certain bond, wherein said L. C. Hall & Company was principal and said United Surety Company was surety, said bond being conditioned that said L. C. Hall & Company should faithfully perform said work according to the terms, covenants and conditions thereof, and

"Whereas, said bond contained a clause to the effect that 'if any notice is served upon the obligee or if the obligee shall have knowledge that the principal is not

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meeting its obligations for labor performed or material furnished, then and thereafter all payments made or to be made under the said contract shall be made through the surety for the protection of all parties in interest' and

"Whereas, the said obligee did heretofore give notice to the said United Surety Company that there was a certain dispute between said L. C. Hall & Company and the Everett Construction Company, a corporation which had performed certain work for said L. C. Hall & Company under said contract, and

"Whereas, it now appears that said Everett Construction Company has filed a lien against the property of the said Island Gun Club, said lien being based upon a claim for work and labor alleged to have been performed for said L. C. Hall & Company under said contract, and

"Whereas, according to the provisions of said bond between L. C. Hall & Company and said United Surety Company given to the said Island Gun Club the said Island Gun Club has paid over certain moneys to said United Surety Company, and said United Surety Company did have in its possession at the time of the execution of these presents the sum of nine hundred eighty-five and 42-100 dollars (\$985.42), being money paid it by said Island Gun Club under the condition hereinbefore set forth, and

"Whereas, the said United Surety Company did pay said sum of nine hundred eighty-five and 42-100 dollars (\$985.42) to said L. C. Hall & Company.

"Now Therefore, the condition of this instrument is such that if the said principals shall pay back to said United Surety Company said sum of nine hundred eighty-five and 42-100 dollars (\$985.42) or such portion thereof as may be necessary to satisfy any claim or judgment which may be established against said L. C. Hall & Company under its contract aforesaid, either by said Everett Construction Company or any other person or claimant, then this obligation shall be void, otherwise to remain in full force and effect."

Thereafter the lien of the Everett Construction Company against the land of the gun club was fore-

closed in an action in the superior court for Skagit county, in which a decree of foreclosure was rendered accordingly, and on January 23, 1917, the gun club was compelled to and did pay the sum of \$2,117.40 in order to free its land from the lien of that judgment and decree. After the execution of the bond here sued upon, the United Surety Company passed into liquidation and into the hands of receivers appointed by the circuit court of Baltimore city, that being its home. Thereafter, on May 18, 1916, the receivers assigned to the gun club all their rights under the bond executed by Hall and the National Surety Company to the United Surety Company and thereafter this action was commenced by the gun club upon that bond.

It is first contended in appellant's behalf that no default rendering it liable upon its bond is shown. The argument seems to be that, since the contract did not in terms provide for the giving of a bond by Hall to secure its faithful performance, and since neither the contract nor the bond given by Hall and the United Surety Company, to secure faithful performance of the contract, provided in terms for the protection of the property of respondent against liens, that, therefore, Hall's failure to settle with the Everett Construction Company, resulting in its lien and the foreclosure thereof against respondent's land, was not a breach of the conditions of the bond given by the United Surety Company; and, there being no breach rendering that company liable upon its bond, it follows that appellant is not liable upon its bond given to the United Surety Company. We may concede that appellant would in no event be liable to respondent upon its bond given to the United Surety Company in the absence of liability of that company to respondent upon its bond. We have noticed that, by the terms of the contract, Hall was to "furnish all skill, labor and

material required for the complete performance of said improvement, in its each and every detail," and that he was to be paid a lump sum as compensation therefor. Manifestly, this means that he was to furnish such labor and material at his own cost and expense, and that he was to see that the cost of such labor and material should not become a burden upon respondent or its property. This, it seems to us, was one of the things for him to do in the faithful performance of his contract and which the bond was given to secure. It is true that the contract did not in terms provide for the giving of the bond to secure its faithful performance, but the bond executed by Hall and the United Surety Company was given to secure the faithful performance of the contract on the same day the contract was signed, and the contract was referred to therein and made part thereof "as fully as if written herein."

We think we are warranted in proceeding upon the assumption that the signing of the contract and the furnishing of the bond in connection therewith was all one transaction as between Hall and respondent. In addition the bond required the United Surety Company to pay out money which should be paid to it instead of to Hall by respondent upon the contract price "for the protection of all parties in interest," manifestly meaning that such money should be held and paid out by the United Surety Company accordingly as the protection of respondent's rights under the contract required. That is, that the money so held by the United Surety Company should be paid out by it towards the satisfaction of claims that might become liens against the respondent's land. We conclude that the United Surety Company was rendered liable upon its bond to respondent in, at least, the sum of \$985.42, upon the payment by that company to Hall of that

sum which had been paid to it by respondent and upon the foreclosure of the lien of the Everett Construction Company for a larger amount which respondent was compelled to pay to free its land from that lien. It seems to follow as a matter of course that appellant would be liable to the United Surety Company upon its bond here sued upon in the sum of \$985.42, since that bond was executed by appellant and given to the United Surety Company for the express purpose of securing the repayment to it of that sum from Hall, should it eventuate that he was not entitled to receive or retain that sum as against respondent's right to have it applied towards the satisfaction of the lien of the Everett Construction Company. This brings us to the question of the rights of the receivers of the United Surety Company and the rights of respondent as their successors in interest, as against appellant.

It is contended by counsel for appellant that there is a failure of showing of authority on the part of the receivers of the United Surety Company to assign to respondent the right of that company under the bond given it by appellant. While it is true that the certified copy of the proceedings of the Baltimore court here in evidence do not show specific authority in the receivers to make the particular assignment here involved, or general authority on their part to sell the property of the United Surety Company, it seems to us, since the receivers are general receivers of that company and this bond was to secure the repayment of \$985.42 paid by it to Hall to the end that respondent's land should be protected as against lien claims arising out of the performance of Hall's contract, that the assignment by the receivers is only a method of adjusting the reciprocal rights and liabilities of the United Surety Company growing out of its bond given to respondent to secure the faithful performance of Hall's

contract and the bond given to it by appellant to secure the repayment to it of the \$985.42 paid to Hall, should it appear that Hall was not entitled to the money as against the claims of respondent to have it applied towards the satisfaction of the lien of the Everett Construction Company, or some other possible lien. This was not the selling of an asset of the United Surety Company which might prejudice the rights of the general creditors or stockholders of that company, but simply a matter of relieving the United Surety Company from the obligations of its bond given to respondent by the assignment to respondent of the right of that company in the bond it had received from appellant for the very purpose of indemnifying itself against its liability upon the bond it had given to respondent. Instead of the United Surety Company's receivers retaining, and themselves suing appellant upon, the bond as, manifestly, they could have done since conditions had occurred entitling that company to have Hall repay the money to it, the receivers, by their assignment were simply placing respondent in their shoes, to the end that he might look to the security which the United Surety Company had acquired for the purpose of enabling it to secure repayment of the \$985.42 from Hall for the benefit of respondent. We are of the opinion that the receivers, by virtue of their office as general receivers alone, had authority to make this assignment.

It is contended that the assignment is so defective in form that it is not in law an assignment by the receivers as such. It contains a number of recitals, referring to the bond given by the United Surety Company to respondent to secure the faithful performance of Hall's contract, referring to the payment by respondent to the United Surety Company of the \$985.42

under the terms of that bond, referring to the payment of that sum to Hall by the United Surety Company upon Hall's executing the bond with appellant as surety conditioned for the repayment of that sum to the United Surety Company should it become necessary, and referring particularly to the claim of the Everett Construction Company by name as being a claim which might require the repayment of the money by Hall, to the end that it might be applied upon such claim, but mentioning no other possible claim by name. In the body of the assignment, the receivers are named as assignors as follows:

"Edwin W. Poe, Stuart S. Janney, Ernest J. Clark and J. Kemp Bartlett, receivers of the United Surety Company duly appointed by order of the circuit court of Baltimore city, hereby and by these presents transfer . . ."

The consideration for the making of the assignment is recited as being the release of the United Surety Company and its receivers from all claim, liability and demand for, or on account of, the execution of the bond which that company had executed as surety with Hall to secure the faithful performance of his contract with respondent. The assignment is signed by each of these receivers by their individual names without official designation.

Counsel call our attention to a number of decisions wherein signers of money obligations have been held personally bound thereby though the signers were described therein as directors, committees, etc., of some named association or corporation, there being no other language indicating that they were acting for the named association or corporation. An examination of these decisions and the many others which might be cited as bearing upon the question of the capacity in which a person executing a writing acts, we think will

disclose that each case is determinable largely upon its own particular facts, that is, the question becomes one of intent in the light of the language used in the particular writing. Where one signs a money obligation or other writing obligating him to do something, ordinarily the obligation will be deemed personal though he may describe himself in the writing by indicating some position he occupies in some association or corporation, providing he goes no further and does not put in the writing some recitals or statements indicating that he is not acting for himself but for the named association or corporation. This seems to be the rule with reference to money or other obligations to be paid or performed. Now when it comes to the assignment of a right which in no event can be considered other than as personal property by a person who concededly has no personal interest in such property but holds the same in some representative capacity, it seems to us that it should not require as strong and convincing inference to be drawn from the language of the assignment to call for the conclusion that the assignment is made in a representative capacity, as when one executes an instrument for the payment of money or for the doing of some act to be performed in the future. It is plain from the recitals in this assignment that it would have been an idle thing for these receivers to have made it as a mere personal act on their part. As individuals they had absolutely nothing to assign, while as receivers they had all the rights of the United Surety Company in this bond to assign, and the recitals in their assignment, it seems to us, plainly evidence an intent to execute the same in their capacity as receivers and to transfer to respondent all the rights of the United Surety Company under the bond executed by appellant. If the assignment does not mean this, it manifestly means nothing. We conclude, there-

fore, that the receivers did assign in their representative capacity although they did not expressly say they assigned *as* receivers, nor did they sign other than their individual names.

It is also contended that the assignment was not proven by competent evidence because the purported signatures thereto of the receivers were not proven to be the genuine signatures of the receivers. After the introduction in evidence by counsel for respondent of the Hall contract, the bond to secure its faithful performance executed by the United Surety Company, the bond executed by appellant to the United Surety Company to secure the repayment of the money which that company paid to Hall, and copy of the Baltimore court proceedings showing the appointment of the receivers, counsel for respondent offered in evidence the assignment of the receivers purporting to be executed by them in the manner we have already noticed, when counsel for appellant addressed the court as follows: "I object to it as incompetent, irrelevant and immaterial" to which the court replied, "Objection overruled, unless there is objection to the form in which it is authenticated"; the court manifestly referring to the assignment and meaning the authentication of the assignment by acknowledgment or proof of the genuineness of the signatures of the receivers. Counsel for appellant now argue that this had reference to the authentication of the proceedings of the Baltimore city court which had theretofore been received in evidence, but, clearly, we think this position is untenable, for at the time the court so ruled there was nothing for it to rule upon except the question of the receiving in evidence of this assignment. It seems to us, in view of the court's remark to the effect that the objection would be overruled unless it be directed to the authentication of the assignment, and counsel for appellant

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making no further objection, they cannot now be heard to say that the receiving of the assignment in evidence was error for want of proof of the genuineness of the signatures of the receivers. Had they insisted upon an objection in that particular manifestly counsel for respondent would have insisted upon and been granted an opportunity to supply proof of the genuineness of the signatures. We think this was in effect a waiver of the necessity of such proof. *Murray v. Seattle*, 96 Wash. 646, 165 Pac. 895.

It is further contended that the bond is not assignable. It is argued that this is so because it is in substance an insurance contract and contains no words or recitals affirmatively showing that it was intended by the parties thereto to be assignable. Counsel invoke the general rule that contracts of insurance are not assignable in the absence therein of language expressly or by plain implication indicating such to be the intent of the parties. We think, however, that the indemnity bond here sued upon while, in a sense, an insurance contract, does not come within the rule invoked. This bond was given by appellant to United Surety Company for the express purpose of securing the repayment to it of the \$985 which it paid out to Hall while it was holding that money "for the protection of all parties interested," under the terms of the bond it had given to respondent; and, manifestly, while both appellant and the United Surety Company fully realized that, if the money was required to be repaid to the United Surety Company, it would be because of the foreclosure of the lien of the Everett Construction Company upon respondent's land, or because of some other possible claim of lien that might menace the title of respondent to its land. In other words, the bond was an asset of the United Surety Company acquired

by it for the express purpose of applying the proceeds thereof either to the payment of any liability it might incur on its bond to respondent or to the reimbursing of itself for any sums it might be compelled to pay on such liability. It may be that there was not such privity of contract between respondent and appellant as would entitle respondent to sue appellant upon the bond it gave to the United Surety Company, without an assignment. We think, however, that the rights of the United Surety Company under the bond given to it by appellant were assignable to respondent in view of the purpose for which that bond was given. The assignment did not change the liability of appellant upon its bond in the least, nor did it impair appellant's ability or opportunity to defend any action which might be brought thereon by respondent. It is in no worse position in this regard than as if the receivers of the United Surety Company were themselves suing upon the bond. The question of the assignability of a bond obligation somewhat like that here involved was learnedly reviewed by the Sixth Federal Circuit Court of Appeals, in *American Bonding & Trust Co. v. Baltimore & O. S. W. R. Co.*, 124 Fed. 866, and a conclusion reached in harmony with this view.

Some contention is made in behalf of appellant that the cause of action here sued upon is barred by the statute of limitations. The cause of action accrued not earlier than April, 1915, when the judgment and decree of foreclosure of the Everett Construction Company's lien upon respondent's land was rendered. This action was commenced in February, 1917, within less than two years thereafter. This we think is a sufficient answer to the contention that the action was barred by the statute of limitations at the time of its commencement. Some other contentions have been made in appellant's behalf. We have not overlooked them,

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but believe they are disposed of, in so far as they merit discussion, by what we have already said.

The judgment is affirmed.

ELLIS, C. J., FULLERTON, MAIN, and WEBSTER, JJ.,
CONCUR.

[No. 14477. Department Two. April 17, 1918.]

THE STATE OF WASHINGTON, *Respondent*, v. JAMES H.
SCOTT, *Appellant*.¹

CRIMINAL LAW — APPEAL — ABATEMENT BY DEATH. A motion to abate a case, on the ground that the accused, out on bail, had disappeared under circumstances tending to show that he had committed suicide, will be overruled where the facts are so recent that it cannot be assumed, short of positive proof, that appellant is dead.

SAME—WITHDRAWAL OF PLEA—VACATION OF JUDGMENT. An application to withdraw a plea of guilty is addressed to the sound discretion of the court; but, in view of Rem. Code, §§ 2111, 2181, requiring such motion and motions in arrest to be made before judgment, it can only be entertained after judgment as an application to vacate the judgment; and if for irregularity or fraud, the judgment is entitled to every reasonable intendment in its support, and will be set aside only upon a clear showing and adjudication of a *prima facie* defense on the merits.

SAME—JUDGMENT—MOTION TO VACATE—EVIDENCE—RECITALS. The recitals in a judgment that the accused was fully advised of his rights, desired no counsel, voluntarily entered a plea of guilty, which was not improperly induced, and that he was sane and mentally responsible, import absolute verity as to the matters transpiring before the court, and cannot be contradicted by the affidavit of the clerk and, when supported by the evidence, warrant the refusal of a motion to vacate for irregularity and fraud.

Appeal from an order of the superior court for Stevens county, Jackson, J., entered September 8, 1915, denying a motion to vacate a judgment and sentence, after a hearing upon affidavits. Affirmed.

¹Reported in 172 Pac. 234.

Carey & Johnson and *L. C. Jesseph*, for appellant.

Howard W. Stull and *H. Wade Bailey*, for respondent.

ELLIS, C. J.—On August 23, 1915, defendant was by information charged with the crime of assault in the second degree. On August 28, 1915, he was arraigned and entered a plea of guilty. The clerk's minutes of arraignment and plea are as follows:

"The defendant being brought into court, was duly arraigned, and on being asked if James Scott was his true name, replied that James H. Scott was his true name. Court ordered that this change be made. On being asked by the court if he had employed counsel, replied that he had not. Court then asked if he was ready to plead to the charge. Defendant then attempted to explain to the court as to what he was willing to plead guilty to. Court advised him in the premises. Defendant then said he would have to plead guilty as that was what he had told the sheriff he wished to do. Court told defendant to be seated and prosecuting attorney then made statement to the court covering the alleged facts in the case. Court then asked the sheriff to state what he knew in connection with attempt of defendant to conceal himself. Court then advised the defendant that he could make a statement to the court. Court then asked defendant if he had anything further to say as to why judgment and sentence should not at this time be pronounced upon him, replied that he had in his statement to the court told the truth and asked the mercy of the court."

On the same day, the court entered judgment and sentence as follows:

"On this 28th day of August, 1915, comes Howard W. Stull, prosecuting attorney in and for the county of Stevens and state of Washington, and the said defendant in this action is brought to the bar of the court here, without counsel, having declined the appointment of counsel for him and having heretofore entered

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his plea of 'Guilty' to the crime of assault in the second degree, and being asked if he has any legal cause to show why judgment of the court should not be pronounced against him, says nothing, unless as he has before said; and it appearing to the court by the said defendant's plea of guilty that the said defendant is guilty of the crime of assault in the second degree, whereupon, all and singular the premises being seen and by the judge of the court here fully understood, it is ordered, adjudged and decreed by the said court, that the said defendant is guilty of the crime of assault in the second degree, and that he be punished therefor by imprisonment in the state penitentiary at Walla Walla, in Walla Walla county, in said state, at hard labor, for a period of not less than three years and not more than ten years, and the defendant is hereby remanded to the custody of the sheriff of said county to be by him detained and by him to be delivered into the custody of the proper officers for transportation to the said penitentiary."

On August 30, 1915, having in the meantime employed counsel, defendant moved the court for an order vacating the judgment and sentence and permitting him to withdraw his plea of guilty and to enter a plea of not guilty. This motion was heard on affidavits and counter affidavits. Defendant made three affidavits. In the first he stated that he was ill at the time of his arrest and arraignment, was without counsel and ignorant of his rights; that his plea of guilty was not voluntary; that the sheriff threatened him and told him that if he employed counsel and made a defense he would certainly be convicted and would receive a longer sentence than if he entered a plea of guilty; that when arraigned defendant told the court he was not guilty of the crime charged but was told that he would not be permitted to detail the circumstances of the incident charged as constituting the crime until he had pleaded either guilty or not guilty. Soon after-

wards he made a second affidavit recanting the charges made in his first affidavit and stating that his plea of guilty was voluntary and without persuasion, intimidation or coercion and that he had no desire to withdraw it. A few days later he made the third affidavit reiterating the things stated in his first affidavit and asserting that he had no recollection of making the second affidavit.

The clerk of the court made an affidavit setting out his minutes as above quoted and further stating that defendant, when arraigned and asked if he desired to plead to the charge, said: "I don't understand just what I am charged with, but I am not guilty of what that man has read" (pointing to the prosecuting attorney); that defendant was informed by the court that he would have to plead guilty or not guilty to all of the information or none of it, whereupon he said: "I told the sheriff that I was going to plead guilty rather than drag that girl into court, for her family and I have been friends for six years or longer." That defendant also stated to the court that he was seventy-one years old, had never been arrested before, was unfamiliar with court proceedings and hardly knew what to do.

The attorney who secured the second affidavit from defendant made an affidavit that, at that time, defendant was in full possession of his mental faculties, was bright and intelligent and fully understood the affidavit and its contents. The prosecuting attorney and his deputy made affidavits to the effect that, when defendant was arraigned, the court asked him if he had counsel and he replied that he had not; that the court then advised him that he had the right to have counsel and defendant replied that he did not desire counsel; that the court then asked him if he was ready to plead to the information and defendant began to relate the cir-

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circumstances of the incident charged as the crime when the court told him he must first enter his plea, whereupon he pleaded "guilty;" that he was then permitted to state fully his version of the incident and added that he was sorry for what he had done and desired to plead guilty rather than bring the girl into court. They also contradicted the affidavit of the clerk that defendant said he was not guilty of what the man had read.

Another attorney who had known defendant for six years made affidavit that he visited defendant in jail the day before he was arraigned and conversed with him for about two hours, advised him fully of his rights and urged him to employ counsel, but defendant stated that he did not intend to employ counsel and in substance expressed an intention to plead guilty. The sheriff made affidavit denying that he ever threatened defendant or in any manner attempted to induce him to plead guilty. This was corroborated by affidavits of several other persons. Two physicians who examined defendant some six days after his sentence made affidavit that they found him in a weakened physical condition but were not able to say whether he was sane or insane; that to determine that matter would require further examination and observation.

Upon considering these and other affidavits the court entered an order denying defendant's motion, the order containing the following recitals:

"And it appearing to the court that prior to said arraignment the said defendant had advised with counsel and had been informed of his rights and that at the time of said arraignment he was fully advised by the court as to his rights to counsel, asked if he had counsel and asked if he desired counsel and replied that he had no counsel and desired none. And it appearing to the court that the plea of guilty made by defendant was freely and voluntarily made, with full knowledge of

his rights and that said plea was not induced or procured by fraud, promises of leniency, force, duress, or any undue influence of any kind or nature by any officer or person; and it further appearing that at the time of entry of said plea and at this time the said defendant was and is in possession of his mental faculties and was and is endowed and possessed of sane and normal understanding and was and is competent to exercise intelligence and volition."

Then follows the order from which defendant prosecuted this appeal.

An affidavit of one of appellant's counsel has been filed in this court stating in substance that appellant, having been released on bail, has disappeared under circumstances tending to show that he has committed suicide. Counsel asks that the cause be abated. The facts stated in his affidavit are, however, so recent that we cannot assume short of positive proof, that appellant is dead or that he will not appear and surrender himself for a new trial or for execution of sentence when the order appealed from is disposed of in this court.

Addressing ourselves to that order, a consideration of the facts which we have very fully set out makes it plain that we cannot disturb it. Though this court, in common with most others, has uniformly held that the application to withdraw a plea of guilty is addressed to the discretion of the trial court and that that discretion should be very liberally exercised, the application nevertheless must be made before judgment. The statute expressly so provides. Rem. Code, § 2111; *State v. Cimini*, 53 Wash. 268, 101 Pac. 891. The same is true of motions in arrest of judgment and for a new trial under the criminal code. These motions must be made before judgment. Rem. Code, § 2181. Obviously, therefore, whether regarded as a motion to withdraw the plea of guilty, or as a motion in arrest of judgment,

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or as a motion for a new trial, or as a combination of all of these, the motion here involved came too late. The express terms of the two sections of the statute above referred to are conclusive of that question.

If the motion can be entertained at all, it must be under the general statute authorizing the modification or vacation of judgments within one year after their final entry, Rem. Code, § 464 *et seq.* We have intimated in at least one case that that law may be invoked to modify or vacate judgments in criminal as well as in civil actions. *State ex rel. Lundin v. Superior Court*, 90 Wash. 299, 155 Pac. 1041. In another case this court, without referring to any statute, directed the trial court to entertain favorably an application to vacate a judgment entered upon a plea of guilty and to permit the plea to be withdrawn. *State v. Allen*, 41 Wash. 63, 82 Pac. 1036. Manifestly, in view of the explicit terms of §§ 2111 and 2181 of the criminal code, that decision can rest only upon the authority of Rem. Code, § 464 *et seq.* This view is strengthened by the facts appearing in the opinion that the plea was improperly induced, that the defendant there was not permitted to communicate with his friends, and that he was not fully or sufficiently informed of his rights, so that we can see that the case might reasonably fall within subd. '3, of Rem. Code, § 464, "irregularity in obtaining the judgment" or subd. 4 of the same section, "fraud practiced by the successful party in obtaining the judgment."

But the same liberal exercise of discretion which is reposed in the trial court by §§ 2111 and 2181, touching the permission to substitute pleas and the motion for a new trial before judgment in criminal cases, is not vested in any court where the application is made under § 464 *et seq.* to vacate a judgment. In such a case, it is elementary that the judgment, unless absolutely

void, is entitled to every reasonable intendment in its favor and will not be set aside except upon a clear showing of irregularity or fraud in its procurement and a tender and adjudication of a *prima facie* defense on the merits. See *Chehalis Coal Co. v. Laisure*, 97 Wash. 422, 166 Pac. 1158, and authorities there cited.

Guided by these principles, let us examine the showing made on the motion here involved. The court, in his order overruling the motion, emphatically recites that appellant when arraigned was "fully advised by the court as to his rights to counsel, asked if he had counsel and asked if he desired counsel and replied that he had no counsel and desired none." The court further found, and his order so recites, that the plea of guilty made by appellant was freely and voluntarily made with full knowledge of his rights and that it "was not induced or procured by fraud, promises of leniency, force, duress or any undue influence of any kind or nature by any officer or person." The court finally found that appellant, at the time of entering the plea and when the motion was heard, was in full possession of his mental faculties, of sane and normal understanding and competent to exercise intelligence and discretion. Substantially the same recitals, save that last above noticed, appear in the judgment of conviction and sentence. As pointed out by this court in *State v. Cimini, supra*, a case in which the motion was made before judgment and therefore one in which the most liberal rule was applicable in favor of the accused, "in so far as these recitals relate to matters transpiring in the presence of the court, they import absolute verity." The recital of the court that appellant was advised by the court as to his right to counsel and refused counsel and voluntarily pleaded guilty must, therefore, be taken as true, and the affidavit of the clerk

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tending to contradict those recitals cannot be considered. The other recitals, that the plea of guilty was not induced by fraud, promises of leniency, or undue influence of any kind by any officer or person, though based on extrinsic evidence, are amply supported by the affidavits of the sheriff and several other wholly disinterested persons. We cannot say that the court's findings in that regard are not supported by a fair preponderance of the evidence. As to the finding that appellant was, at the time of his plea and sentence and at the time of the hearing, perfectly sane and capable of intelligent volition, there is no substantial evidence to the contrary. The affidavits to that point tend to establish nothing more than that he was temporarily ill and physically weak. Neither of the physicians could or would say that he was not sane.

A most careful examination of the record and of all of the affidavits offered on the hearing of the motion convinces us that neither the law nor the facts warrant a reversal of the court's order. It is, therefore, affirmed.

MOUNT, PARKER, HOLCOMB, and CHADWICK, JJ., concur.

[No. 14555. Department One. April 17, 1918.]

DAVID PETERS, *Respondent*, v. CASUALTY COMPANY OF
AMERICA, *Appellant*.¹

MUNICIPAL CORPORATIONS—STREETS—NEGLIGENCE OF DRIVER OF JITNEY—OWNERSHIP OF CAR—EVIDENCE—STATUTES—PRESUMPTION. Under Rem. Code, § 5562-13, providing that, upon the sale of any motor vehicle, delivery shall not be deemed to have been made until the vendor removes his license plates, in an action for personal injuries suffered through the negligence of the driver of a jitney, bonded by the defendant surety company and carrying the license number issued to the principal in the bond, it will be conclusively presumed that he owned the car, operated under his permit and license number, although he had executed a contract purporting to convey all title to another and voluntarily left his license number on the car pursuant to an understanding of all the parties to the sale.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE. A new trial for newly discovered evidence is properly overruled where the evidence could not be properly regarded as newly discovered, and would not be likely to obtain a different verdict.

Appeal from a judgment of the superior court for King county, Tallman, J., entered March 12, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Affirmed.

Bradford, Allison & Egan, and *Henry S. Noon*, for appellant.

MacKinnon & Schooley, *E. H. Guie*, and *J. A. Guie*, for respondent.

PARKER, J. — This action was commenced by the plaintiff Peters against the defendants, Schwartz and wife and the Casualty Company, seeking recovery of damages claimed to have been suffered by him through the negligence of Schwartz, acting by his agent, in the operation of his automobile for hire in the city of Seattle. The Casualty Company was made a defend-

¹Reported in 172 Pac. 220.

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ant, because it had executed a bond as surety with Schwartz as principal, in pursuance of ch. 57, Laws of 1915, p. 227, Rem. Code, § 5562-37 *et seq.*, relating to motor vehicles as passenger carriers in cities of the first class; so that, in so far as the action is against the Casualty Company, it is an action upon the bond. Trial in the superior court for King county sitting with a jury resulted in verdict and judgment against the Casualty Company in the sum of \$1,875, from which it has appealed to this court.

It is contended in appellant's behalf that there was a failure of proof of ownership of the car in Schwartz at the time respondent was injured by its operation, and that appellant had been released from the obligation of its bond because Schwartz had then sold the car, which was then being operated by another person. The bond upon which recovery is sought was executed and filed in the office of the secretary of state on April 24, 1916, and thereupon a permit was issued under chapter 57, Laws of 1915, p. 227 (Rem. Code, § 5562-37 *et seq.*), to Schwartz to operate his car for hire in the city of Seattle. Schwartz had theretofore received his license for this car for the year 1916, the license number being 36,388 which is the number specified in the bond as descriptive of the car. Thereafter, on May 25, 1916, Schwartz executed a contract of sale for the car, and thereafter other contracts were executed, all purporting to transfer the title of the car to other persons. While there are some circumstances shown in the record which suggest that Schwartz had at all times retained some interest in the car, we shall assume, for argument's sake, that, as between him and subsequent purchasers under these contracts, he parted with all interest in it. The license number plates for the year 1916 issued to Schwartz and placed upon the car by him were never removed by him or any other

person during that year and the automobile was continued to be operated for hire under that number. Indeed, it seems highly probable that the number plates were left on the car in pursuance of the understanding of all the parties to these contracts of sale. So that, in so far as the license number plates and the license and bond records of the state relating to the operation of automobiles for hire are concerned, the public was, in effect, advised that the car belonged to Schwartz and was being operated by him for hire. The car was being so operated for hire in the city of Seattle on June 27, 1916, when respondent was injured, as he claims, by the negligence of its driver, at the intersection of Spring street and Third avenue.

Section 13, ch. 142, Laws of 1915, p. 391 (Rem. Code, § 5562-13) reads in part as follows:

“Upon the sale of any motor vehicle the delivery thereof shall not be deemed to have been made until the vendor shall have removed his number plates therefrom.” . . .

This provision of the general motor vehicle law and the facts above noticed, we conclude, answers the contention made in appellant's behalf that there was no proof of the ownership of the car by Schwartz at the time respondent received his injury. It seems to us that Schwartz having failed to remove his license number plates in compliance with the mandatory provisions of this section, he must be conclusively presumed to be the owner and operator of the car at least during the year 1916, and that it must be conclusively presumed as against him that whoever was in fact operating the car with the license number plates of Schwartz voluntarily left thereon by him was doing so as his agent. These acts, both passed at the 1915 session of the legislature, were the law as it existed when the appellant executed the bond as surety with Schwartz. We

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think it follows that Schwartz, being thus the owner of the car in so far as the rights of the public are concerned, at the time respondent was injured, appellant is also liable as surety upon the bond. Our recent decision in *McDonald v. Lawrence*, 100 Wash. 215, 170 Pac. 576, contains observations made by Judge Fullerton, speaking for the court, quite in harmony with this conclusion.

Counsel for appellant cite and rely upon a number of decisions dealing with the question of the weight of presumptions as against evidence tending to overcome them. We think the rule as announced by such decisions is not applicable here, in view of the provisions of § 13, Laws 1915, p. 391 (Id., § 5562-13), as above quoted. In other words, we think the statutory rule there prescribed is in effect a conclusive presumption as against the owner of the car who voluntarily leaves his license number plates thereon when he sells it. That is, in so far as the rights of the public are concerned under the general motor vehicle statute and the statute under which the bond of appellant was given, such owner of the car is conclusively presumed to remain the owner.

Counsel for appellant cite and rely upon our recent decision in *Young v. Wilson*, 99 Wash. 159, 168 Pac. 1137. That was a case where there was involved an attempted transfer of the license number from one machine to another owned by a different person, and not a case of an owner voluntarily leaving his license number plates upon his machine when he sold it. We think that decision is not controlling here.

It is contended in appellant's behalf that respondent was guilty of contributory negligence, and that it should be so decided as a matter of law. This question was presented to the trial court by appropriate motions. We have reviewed the evidence with care looking to the proper determination of this question,

and are thoroughly convinced that it was for the jury to decide, and that the court could not decide, as a matter of law, that the driver of the machine was not guilty of negligence or that respondent was guilty of contributory negligence.

It is finally contended in appellant's behalf that it is entitled to a new trial because of newly discovered evidence. This contention is presented to us in appellant's brief within the space of one-half page thereof; in fact, it is practically nothing but a claim of error rather than an argument in support thereof. We feel justified in disposing of it in an equally summary manner. We have, however, read the affidavits presented in support of and in opposition to the motion for new trial, and are quite convinced that they do not show any evidence which in law could be regarded as newly discovered, and read as a whole they seem to render it quite unlikely that a different verdict would be returned by a jury upon a new trial, even if the evidence so claimed to be newly discovered were presented to a jury.

The judgment is affirmed.

ELLIS, C. J., MOUNT, and HOLCOMB, JJ., concur.

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Syllabus.

[No. 14304. Department Two. April 18, 1918.]

NATIONAL SURETY COMPANY, *Appellant*, v. AMERICAN
SAVINGS BANK & TRUST COMPANY, *Respondent*,
BRATNOBER LUMBER COMPANY *et al.*, *Defendants*.¹

APPEAL—REVIEW—DISCRETION—MOTION TO DISMISS. The denial of a motion to dismiss for want of prosecution, will not be disturbed on appeal except for abuse of discretion.

MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSIGNMENT BY CONTRACTOR—CONSTRUCTION—VALIDITY AS AGAINST CLAIMANTS. A contractor's assignment to a bank of all sums to come due from the city, made for the purpose of financing the work, which provided that it shall not be valid as against claims for labor and materials, does not make the money a trust fund in the hands of the bank for the benefit of labor and material claims accruing and filed with the city after the seventy per cent of the estimates were paid to the bank as earned by the contractor, who was not in default, the intention being to authorize the city to pay to the bank what it might have paid to the contractor.

SAME. Since such an assignment is not an appropriation of the fund, until actual payment, and then only *pro tanto*, it passes absolute title to each installment of the money to become due to the contractor, subject only to any claims for labor or material then existing and of which the city has notice when the payment was made; and neither the city, claimants, nor the contractor's surety could recover the money.

SAME—IMPROVEMENTS—ASSIGNMENTS BY CONTRACTOR—RELEASE OF FUNDS ASSIGNED—RIGHTS OF SURETY AND ASSIGNEE. Where the absolute title to money earned by a contractor had passed and the money had been paid to the contractor's assignee, a bank that had been financing the work, and to whom the contractor was heavily indebted, the surety's written request to the bank to release certain sums in its possession for the purpose of paying claims, raises an implied promise by the surety to repay the bank, if the contractor did not, where the surety was thereby relieved from the necessity of paying the claims, and in its request expressly agreed that the bank should forfeit none of its rights by releasing the money; notwithstanding the parties were not sure of their rights under the assignment.

INTEREST—CLAIMS FOR MONEY—IMPLIED PROMISE—LIQUIDATED AMOUNTS. Where the amounts held by a contractor's assignee and

¹Reported in 172 Pac. 264.

released, on the request of the surety, for the payment of claims, under an implied promise to repay the same, if the contractor did not, were liquidated, interest is properly allowed on their recovery by the assignees.

Appeal from a judgment of the superior court for King county, Jurey, J., entered February 2, 1917, upon findings in favor of cross-complainant, in an action of interpleader, tried to the court. Affirmed.

C. B. White, for appellant.

Farrell, Kane & Stratton, for respondent.

ELLIS, C. J.—In December, 1909, one Paul Steenstrup entered into a contract with the city of Seattle for the improvement of Western avenue. He furnished the statutory bond conditioned as required by the act of 1909, Laws of 1909, p. 716, Rem. Code, § 1159, with the National Surety Company as surety. To finance the work, the contractor made an arrangement with American Savings Bank & Trust Company to advance the necessary money as the work progressed, giving to the bank an assignment of all moneys to become due under the contract. This assignment was on a city form, and at its foot, beneath the contractor's signature, was printed: "This assignment is not valid as against any claims for labor, material, provisions and goods supplied and furnished in the prosecution of this contract." This assignment was filed with the city. Under this arrangement the bank advanced, from time to time, considerable sums, applying moneys received from the city on monthly estimates in partial repayment. Before the completion of the work, numerous claims for labor and materials furnished to the contractor in the prosecution of the work were filed with the city as claims against the bond. After the work was completed, in June, 1911, the National Surety Company brought an action interpleading the various

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claimants to adjudicate and determine their claims. The American Savings Bank & Trust Company was made a party defendant as asserting some claim to the thirty per cent of the contract price for the work reserved by the city under the usual provision in the contract requiring such reservation to protect claimants for work, labor and supplies furnished. Plaintiff prayed that any claim of the bank be adjudged inferior to all valid claims for labor and material.

The bank filed its original answer and cross-complaint, parts of which plaintiff moved to strike. Owing to the difference in the issues, the bank requested that the cause be continued as to it until the claims for labor and material had been finally determined. The postponement was granted upon a stipulation signed by the respective attorneys for plaintiff and the bank that it should be without prejudice or effect upon the rights or liabilities of either of the parties. The case proceeded to judgment as to the other defendants, and on appeal was finally determined in this court in 1912. *National Surety Co. v. Bratnaber Lumber Co.*, 67 Wash. 601, 122 Pac. 337. In January, 1915, plaintiff moved for a dismissal of defendant bank's cross-complaint for want of prosecution. The motion was denied.

On January 27, 1916, the bank filed an amended answer and cross-complaint setting up two causes of action. With the first of these we are not concerned. The court denied a recovery thereon and the bank has not appealed. For its second cause of action the cross-complainant set up its assignment from the contractor, its reception of money from the city thereunder which it is alleged it had the right to apply upon the contractor's indebtedness to it, and avers that, in November, 1910, the surety company agreed with the bank that, if it would allow the money to be placed in a joint

account of the contractor and the surety company for use in finishing the contract, the surety company would protect the bank from loss thereby. It is then averred that, pursuant to such agreement, the bank placed to such account \$7,200, \$2,400, and \$1,000 of the moneys received by the bank from the city as proceeds of Steenstrup's contract with the city. Judgment for \$10,600 was demanded. These allegations were traversed by reply.

The evidence was voluminous. We shall indicate no more than its salient features. By November, 1910, the bank had advanced to the contractor over \$30,000, a large part of which was unpaid. It declined to make further advances. On the November estimate of work performed on the contract, it received from the city under its assignment \$7,200. The surety company thereupon delivered to the bank a writing as follows:

“November 26, 1910.

“American Savings Bank & Trust Company,

“and Mr. James P. Gleason, Manager,

“Seattle, Washington.

“In the matter of the contract of Mr. Paul Steenstrup on Western avenue, the National Surety Company hereby consents that you may pay and requests you to pay the money received on estimate either yesterday or today, amounting, as I understand it, to about \$7,200, to laborers or materialmen who have claims against Mr. Steenstrup, or allow Mr. Steenstrup to so make such payments, you to forfeit no rights by allowing this money to be so used and applied.

“National Surety Company,

“By John Roberts,

“Resident Vice-President.”

The bank, in compliance with this request, refrained from applying this money on Steenstrup's notes, but placed it to Steenstrup's credit and allowed it to be checked out by Steenstrup under the supervision of

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the surety company in payment for labor and material supplied in further prosecution of the work. On the December, 1910, estimate the bank received from the city \$2,400. This sum, in compliance with a like written request from the surety as before, was placed to Steenstrup's credit and used in the same way. There is no evidence that, when these estimates were paid by the city to the bank, any claims for labor or material had been filed with the city or that the city had any notice or knowledge of any unpaid claims, if there were any.

By January, 1911, the \$9,600 turned over to Steenstrup on these two requests had been exhausted. More money being needed, the surety company indorsed Steenstrup's notes to the bank for an additional loan of \$10,000. This was placed in a joint account of the surety company and Steenstrup to be checked against only on the signatures of both. These notes were afterwards paid by the surety company and are not here involved, except as explaining the overdraft created in compliance with a third request by the surety company as follows:

“February 14, 1911.

“American Savings Bank & Trust Company,

“J. P. Gleason, Manager,

“Seattle, Washington.

“Gentlemen:

“In the matter of contract of Paul Steenstrup on Western Avenue.

“In the matter of the joint account of Paul Steenstrup and the National Surety Company in your bank, request is hereby made on you to allow an overdraft of not to exceed one thousand dollars (\$1,000) on checks signed as heretofore on said account, and when the next estimate is received from the city on the Western Avenue contract for which said account is carried you are requested to place from said moneys allowed and paid on said estimate such amount as may be over-

drawn to the credit of said account before applying such estimate on the notes of Paul Steenstrup held by your bank. Yours very truly,

“National Surety Company,

“By John W. Roberts,

“Resident Vice-President.

“Geo. W. Allen,

“Resident Assistant Secretary.”

The overdraft to the amount of \$1,000 was permitted, and the bank's evidence tended to show that, instead of applying moneys thereafter received on estimates from the city to the payment of Steenstrup's unpaid notes, the bank, as requested in the above quoted writing, gave the surety company credit for it, thus giving the debt created by the overdraft the same status as the money turned over on the other two orders.

The court found in favor of defendant bank on its second cause of action and rendered judgment in its favor for \$10,600, and interest, in all, \$14,428.60. Plaintiff appeals.

It is first contended that the court erred in refusing to dismiss respondent's cross-complaint for want of prosecution. The motion to dismiss on this ground is a matter within the discretion of the trial court. The exercise of that discretion will not be disturbed except for abuse. *Loving v. Maltbie*, 64 Wash. 336, 116 Pac. 1086. We have read and carefully considered the affidavits on both sides addressed to this motion. An extended discussion would serve no useful purpose. We are not convinced that there was any abuse of discretion in this case.

On the merits, the crux of this controversy is this: Did the city have the right to pay to respondent bank the seventy per cent of the monthly estimates here involved? The solution of this question depends upon the

construction of the assignment in the light of its purpose and subject-matter. Appellant contends, in substance, that the assignment, by reason of its being subject to claims for labor and material, made this money a trust fund in the hands of the bank with which to pay such claims, though accruing and filed with the city after these estimates were earned by the contractor and paid to the bank. We cannot accede to this view. The conceded purpose of the assignment was to enable the contractor to finance the work. It must be assumed, therefore, that the parties thereto intended that the assignment should authorize the city to pay to the bank and the bank to receive, on each estimate when it accrued, whatever the city in pursuance of its contract would have paid to Steenstrup on each such estimate in the absence of the assignment. This would have been the so-called contractor's seventy per cent of each monthly estimate, if there were then no unpaid claims for labor or material filed with the city, the contractor not then being in default. *Dowling v. Seattle*, 22 Wash. 592, 61 Pac. 709; *Maryland Casualty Co. v. Washington Nat. Bank*, 92 Wash. 497, 159 Pac. 689; *Northwestern Nat. Bank of Bellingham v. Guardian Casualty & Guaranty Co.*, 93 Wash. 635, 161 Pac. 473; *Title Guaranty & Surety Co. v. First Nat. Bank*, 94 Wash. 55, 162 Pac. 23; *Van Doren Roofing & Cornice Co. v. Guardian Casualty & Guaranty Co.*, 99 Wash. 68, 168 Pac. 1124.

In the case of *Northwestern Nat. Bank of Bellingham v. Guardian Casualty & Guaranty Co.*, *supra*, upon the authority of *Dowling v. Seattle* and *Maryland Casualty Co. v. Washington Nat. Bank*, *supra*, we held that an absolute and unqualified assignment by the contractor of any fund thereafter to become due to him and not reserved by his contract for the protection of laborers and materialmen, the assignment having been accepted by the city prior to the contractor's default

and prior to any notice of nonpayment for labor and material, was a valid appropriation of such fund prior and superior to any rights of laborers and materialmen in the fund, and hence superior to any right of subrogation in the surety on the contractor's bond. In such a case, a payment by the city to the assignee, even after claims for labor and material had been filed, would be valid as to all but the reserve fund. In that case, however, it is distinctly indicated that the assignment was not, as here, expressly subject to claims for labor and material supplied in the prosecution of the work. An assignment so qualified is not an appropriation of the fund. Under such an assignment, as pointed out in *First Nat. Bank v. Seattle*, 71 Wash. 122, 127 Pac. 837, the appropriation of the fund does not take place until actual payment to the assignee, and then only *pro tanto*.

In the last cited case, the assignment to the bank of the contractor's seventy per cent fund was, as here, expressly subject to claims for labor and material supplied in the progress of the work. In that case, however, contrary to the case here, the money over which the contest was waged as between the surety company and the bank as assignee of the contractor was still in the hands of the city. It was the last part of the seventy per cent fund, which had been held up by the city evidently in anticipation of claims for labor and material under a provision of its contract with the contractor *permitting* the city, but not *requiring* it, to hold up any part of the contract price until satisfied that all claims for labor and material had been paid. In that case, marking a supposed distinction between that and the *Dowling* case, we said:

"Here the balance of this seventy per cent fund has not been paid the contractor, and the city has knowledge of these liens for labor and materials. In that case we held that the holders of the bonds so issued were en-

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titled to their proceeds because the payments, being justified when made, were not invalidated by the contractor's subsequent default. In that case the payment was made when due under the contract, without notice of adverse claims. In this case the payment has not been made, and there is notice of adverse claims such as, under the language of the contract and the assignment, are entitled to preference."

This language clearly indicates that, had the money involved in the *First Nat. Bank* case been actually paid to the assignee bank by the city prior to the contractor's default and without knowledge or notice of any unpaid labor and material claims (which was actually done in the case before us), the payment would have been held valid and the bank would have been held entitled to retain the money as against subsequently filed claims, notwithstanding the qualified nature of its assignment.

If the above language from the case of *First Nat. Bank v. Seattle* is still adhered to, the assignment must be held to be an assignment of each installment of the money to become due to the contractor under the contract as earned, subject only to any claims for labor or material then existing and of which the city has notice when such installment falls due, and subject to the right of the city to hold up any such installment in anticipation of such claims. If, therefore, the city actually pays any such installment to the assignee without notice of labor or material claims and before default of the contractor, such payment must be held to pass an absolute title to the money under the assignment. The assignment was made for the very purpose of raising money with which to finance the performance of the contract. The contractor had the right to make an absolute assignment, unqualified by any reference to labor and material claims, of this seventy per cent which was to be paid to him on monthly estimates.

He made an assignment not absolute, but subject to claims for labor and material. There were no such claims when this money was paid. In order to accomplish the purpose intended; viz., that of aiding the contractor to finance the contract, the assignment must be construed as passing an absolute title to any part of the seventy per cent fund coming due to the contractor, if actually paid to the assignee at a time when there were no claims for labor or material filed and when the contractor was not in default on his contract.

Appellant recognizes the force of our decision in the case of *First Nat. Bank v. Seattle*, but asks: How did the bank get a better right to this money merely by getting actual possession of it? We have already answered this question in our construction of the assignment. The following considerations make that construction almost imperative: While the original contract between the contractor and the city is not in the record, it is recognized in the briefs on both sides that the contract contained the usual provision authorizing the city to pay to the contractor on monthly estimates seventy per cent of the money earned each month as the work progressed, but required the city to withhold each month the other thirty per cent as a fund to meet claims for labor and material which might thereafter be filed. Though it is not mentioned in the briefs, we assume that the contract or specifications therein referred to contained the other usual provision that the city might withhold any and all payments under the contract until satisfied that all labor and material supplied for the work had been paid for; at any rate, this assumption is the one most favorable to appellant. Such a provision, as pointed out in *Dowling v. Seattle*, *supra*, and again in *Northwestern Nat. Bank of Bellingham v. Guardian Casualty & Guaranty Co.*, *supra*, amounts to no more than a permission to the city to

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exercise a discretion in the premises. It creates no duty to any one on the city's part. The assignment from the contractor to the bank was made on a printed city blank. The statement that the assignment was not to be valid as against claims for labor and material appears underneath the contractor's signature and was evidently placed there as a recognition of the city's privilege to hold up any or all of the money in its discretion. When, therefore, the city, without notice of claims and before default of the contractor, paid to the assignee the seventy per cent estimates, it acted within its rights and no one can complain. Neither the city nor labor or material claimants could then recover the money; *a fortiori*, the surety could not.

There is considerable controversy as to whether or not the contract was taken over and completed by the surety company in the contractor's name. But the view which we take of the assignment and the transaction between the surety company and the bank whereby, at the surety's request, the bank relinquished the money in its possession for use in further carrying on the work, makes it immaterial whether the work was actually completed by the surety or by the contractor. In either case the release operated to relieve the surety of the immediate necessity of furnishing money to carry on the work, and its agreements that the bank should forfeit no rights by so doing were made for no other purpose.

Appellant argues that it made no promise to repay this money. But, as we have seen, it was at the time the bank's money. It is manifest that, when the bank released it at the request of the surety company, which in writing agreed that the bank was to forfeit no rights by so doing, there arose an implied promise to repay it if Steenstrup, the contractor, did not. The

surety cannot retain the benefit and deny the liability. Appellant insists that, when it made these written requests for the release of the money by the bank, it was evident that the bank had no rights that it could waive, and adds: "The bank well realized that it could not demand that the surety company promise to repay this money which was, of course, going to potential and possible lien claimants." It may be admitted that neither party was then certain as to the bank's rights. But the surety company, in substance and effect, agreed to protect the bank's right in the premises whatever those rights might be. The fact that neither party seemed sure at the time as to just what those rights were can make no difference in the final effect and result of the undertaking. The surety company cannot be heard to say that, because those rights were in law greater than it had supposed, therefore it is not bound by its agreement that they should be preserved.

Appellant frequently states that the \$1,000 item was money never in the hands of the bank, but adds: "The overdraft was from *the bank's own funds*, not from the proceeds of the contract." It was certainly in the bank's hands before the overdraft was permitted and was a loan pure and simple to the surety company and Steenstrup. If it was ever paid, it was paid from money which, so far as the record shows, was money which the bank would have had the right to have applied on Steenstrup's old notes, and the trial court so found. In fact, that is exactly what the surety company requested should be done in its communication of February 14, 1911. The request was in itself a recognition of the bank's right to apply the estimates on the Steenstrup notes.

Finally, appellant contends that no interest should have been allowed on these claims. But the amounts claimed were liquidated. They were in substance

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claims for money loaned. We know no legal reason for withholding interest. The judgment is affirmed.

MOUNT, CHADWICK, and HOLCOMB, JJ., concur.

[No. 14374. Department One. April 18, 1918.]

A. ROSENBAUM, *Respondent*, v. NORTHERN PACIFIC
RAILWAY COMPANY, *Appellant*.¹

CARRIERS—ARRIVAL OF SHIPMENT—NOTICE TO CONSIGNEE. One who consigns perishable goods to himself at a place where he does not reside and has no representative or place of business cannot complain of the failure of the carrier to notify him of the arrival of the goods.

SAME—ARRIVAL OF SHIPMENT—NOTICE TO AGENT. Where a shipper of a car of apples, consigned to himself, arranged that they be stopped at a place where he had no place of business and received by T., a buyer, who was to take up the bill of lading, T. was the agent of the consignor for the purpose of receiving notice of arrival, and actual notice and inspection by T. relieves the carrier from giving notice to the consignor.

SAME—DUTY AS WAREHOUSEMAN. After actual notice, given to the consignor's agent for that purpose, of the arrival in good condition of a car of apples, the carrier's liability is that of a warehouseman, and is discharged by the exercise of reasonable care in protecting the fruit from loss or damage.

Appeal from a judgment of the superior court for Franklin county, Truax, J., entered April 13, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action to recover from a carrier for the loss of goods. Reversed.

Cannon & Ferris and *E. A. Davis*, for appellant.

Charles W. Johnson, for respondent.

WEBSTER, J.—On December 9, 1916, respondent brought this action, alleging in substance, that, on

¹Reported in 172 Pac. 238.

October 8, 1915, a car load of apples was delivered by C. A. Rosenbaum to the appellant at Monte, Washington, to be shipped to Crosby, North Dakota; that the appellant accepted the shipment and charged the regular freight rate thereon; that it failed to deliver the same, and failed and neglected to properly care for the shipment, which consisted of perishable fruit, and by reason thereof the goods were lost to the shipper; that the value of the apples was \$795.20, and that the shipper's claim for such loss had been assigned to A. Rosenbaum, the plaintiff in the action. Judgment was prayed for in the sum of \$795.20, with interest from October 8, 1915.

The appellant answered, in substance, that the shipment was received, denying all other material allegations of the complaint. As an affirmative defense, it further pleaded that the shipment was moved to Kenmare, North Dakota, where it arrived in good condition on October 15, 1915, billed to C. A. Rosenbaum; that said Rosenbaum did not, nor did any one else, accept delivery of the car or call to inspect the same, though the connecting carrier at that point used due and every endeavor to locate the consignee, the owner of the apples, or his agent; that, on or about October 24, 1915, while the apples were in perfect condition, one G. S. Trimble, who then claimed to be the owner of the shipment, examined and inspected the same and found it in perfect condition, but refused to take the car or dispose of the shipment; that, on December 12, 1915, the connecting carrier was required to dispose of the car of apples to best advantage, receiving therefor the sum of \$650, which, after deducting freight charges and demurrage charges, left a balance of \$129.54, the amount tendered into court for the benefit of the shipper, and that the loss, if any, was due solely to the negligent acts and omissions of C. A. Rosenbaum and

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his agents, and not to any fault of the defendant or its connecting carrier. The reply traversed the allegations of the affirmative answer.

The cause was tried to a jury. At the conclusion of the plaintiff's case, and at the conclusion of the entire case, the defendant's challenge to the sufficiency of the evidence and its motions for nonsuit and directed verdict in its favor were overruled by the court. Thereafter a verdict in plaintiff's favor for the full amount claimed was rendered, and from an order overruling a motion for a new trial and from the judgment entered on the verdict, the defendant appeals.

Errors are assigned upon the rulings of the trial court in overruling the motions for nonsuit and for judgment in defendant's favor, in overruling its motion for new trial and entering judgment for plaintiff, also in giving certain instructions to the jury. In view of the conclusion we have reached as to the disposition of the case, it will not be necessary to discuss the class of errors last mentioned.

The controlling facts, which are not disputed, are these: The apples were delivered to appellant at Monte, Washington, consigned to C. A. Rosenbaum, the shipper, at Crosby, North Dakota, the bill of lading, however, containing the following notation, "Stop at Kenmare, N. D. for partial unloading." The shipment moved over the lines of appellant and its connecting carrier to Kenmare, North Dakota, arriving at that point on October 15, 1915. The consignor, through the Central Bank of Toppenish, Washington, forwarded the bill of lading with sight draft attached in the sum of \$700 to the First National Bank of Kenmare, North Dakota, with instructions to deliver the bill of lading to G. S. Trimble upon the payment of the draft by him. Upon the arrival of the apples at Kenmare, the carrier's agent, not being acquainted with

any C. A. Rosenbaum at that point, endeavored to locate such person, but was unable to do so. It is admitted that the consignor, who was also the consignee of the shipment, was not at Kenmare or Crosby between October 8, 1915, and December 14, 1915, to receive the apples, did not have any place of business at either point, and had made no arrangements with any one to accept or receive the same, other than the arrangement with G. S. Trimble hereinafter referred to; neither did he at any time instruct the agent of the carrier at Kenmare to forward the shipment to its ultimate destination at Crosby, North Dakota. Prior to the shipment of the apples, the consignor had arranged with Trimble to be at Kenmare and receive the shipment. The record in this respect discloses,

“Q. Now, you heard the admission as to the condition of the apples and the value of them. They were shipped to the order of C. A. Rosenbaum. In the bill of lading there is a statement that they were to stop at Kenmare, North Dakota, for partial unloading. Did you have any one at Kenmare that was planning on buying these apples and taking a part of them out at Kenmare? A. Yes, sir; there was a man there that was to take them there. Q. What arrangement did you make for payment for them, should he take them at Kenmare, North Dakota? A. There was a draft attached to the bill of lading, and if he paid the draft, the apples were to be his own.”

The party referred to in this testimony was G. S. Trimble. Shortly after the arrival of the shipment at Kenmare, upon being unable to locate C. A. Rosenbaum at that point, the agent of the carrier, knowing that G. S. Trimble was receiving apples and disposing of them there, took up with him the matter of whether he was interested in the Rosenbaum shipment. In reply to the inquiry, Trimble said that he would take care of the car, and that there was a draft at the First

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National Bank of Kenmare with the bill of lading attached. On October 24, 1915, in company with the carrier's agent, Trimble inspected the car of apples, and upon the subject of his arrangement with C. A. Rosenbaum, the record shows he testified as follows,

"Q. And the understanding was that he would bill it back to you and you would take it up and dispose of it?
A. Yes, sir, I told him I would try to."

Trimble made several attempts to sell the apples to merchants at Kenmare, and not being able to dispose of them at that point, had the bank at Kenmare request permission of the shipper to divert the car to Thief River Falls, North Dakota, where Trimble expected to dispose of them. That the consignor had knowledge that the shipment had arrived at Kenmare and was being held at that point by the carrier pending negotiations with Trimble with reference to its disposal is conclusively established by the following correspondence:

"First Natl. Bank, Seattle, Wn. Nov. 9-15.

"Kenmare, N. D.

"Gentlemen: Some time ago the Central Bank at Toppenish, Wn. sent you sight draft for \$700 with bill of lading attached. Draft to be paid by G. S. Trimble of Toppenish. Bill of lading for carload of apples. Up to date have not heard anything regarding the covering of this draft. Has Mr. Trimble been at the bank to make arrangements for the same? Draft was sent about four weeks ago. Any information will be appreciated. Yours truly,

"C. A. Rosenbaum.

"Address No. 16 West Mercer St.,

"Seattle, Washington."

"First National Bank, Kenmare, North Dakota,

"Mr. C. A. Rosenbaum, Nov. 16, 1915.

"16 West Mercer St.,

"Seattle, Wash.

"Dear Sir: In reply to your letter of the 9th, I beg to advise that I talked with Mr. Trimble this morning

regarding the bill of lading of \$700 and he stated that he wanted permission to have this car transferred from here to Thief River Falls. He further stated that he would take same up very soon. Will you kindly advise if this will be satisfactory?

“Yours very truly,

“G. A. Trzcinski, Ass't. Cashier.”

“First Nat. Bank, Seattle, Wn., Nov. 19-15.

“Kenmare, N. D.

“Gentlemen: Your letter at hand, in reply will say that when Mr. Trimble pays draft of \$700 attached to bill of lading, then the apples are his and he may ship wherever he wishes. Hope this meets with approval and that we have an early settlement.

“Yours truly,

“No. 16 W. Mercer St. C. A. Rosenbaum.”

“Ft. Agt. Seattle, Wash. Nov. 19-15.

“Toppenish, Wn.

“Dear Sir: About Oct. 8-15—I had a carload of apples billed from Monte to Crosby, N. D. Car No. 95319 with sight draft attached to bill of lading. Clause also on bill for a stop at Kenmare N. D. for partial unloading. Up to date have not heard from it. Would like to know if it has been accepted and unloaded.

“Address 16 W. Mercer St. Yours very truly,
“Seattle, Wn. C. A. Rosenbaum.”

The shipment remained at Kenmare without further instructions from the consignor as to its disposition until about December 15, 1915, when it was sold by the carrier to prevent damage and loss from freezing.

Respondent predicates his right of recovery upon the failure of the carrier to notify him or his assignor of the arrival of the apples at Kenmare, and the failure to properly care for the shipment after its arrival.

The law seems to be well settled that one who delivers property to a carrier, consigned to himself at a place where he does not reside and has no representatives or place of business, is bound to put himself in a position to receive the notice; and failing to do so,

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cannot be heard to complain that notice was not given. *St. Louis, I. M. & S. R. Co. v. Townes*, 93 Ark. 430, 124 S. W. 1036, 26 L. R. A. (N. S.) 572; *Pelton v. Rensselaer & Saratoga R. Co.*, 54 N. Y. 214, 13 Am. Rep. 568; *Adams Express Co. v. Darnell*, 31 Ind. 20, 99 Am. Dec. 582; *Alabama & Tenn. Rivers R. Co. v. Kidd*, 35 Ala. 209; *Mobile & Girard R. Co. v. Prewitt*, 46 Ala. 63, 7 Am. Rep. 586; *Northrop v. Syracuse etc. R. Co.*, 5 Abb. Pr. (N. S.) 425; *Clendaniel v. Tuckerman*, 17 Barb. (N. Y.) 184; 2 Hutchinson, Carriers (3d ed.), § 723; 1 Moore, Carriers (2d ed.), § 10.

In *St. Louis, I. M. & S. R. Co. v. Townes*, *supra*, a case very similar to the one in hand, Chief Justice McCulloch, speaking for the supreme court of Arkansas, said:

“As the company was required by the terms of the contract to give him notice of the arrival of the cars at Texarkana, there was a corresponding duty devolving on him to put himself in position to receive the notice, so that the same would be available. Any attempt to give him notice at Texarkana would have proved fruitless, for he was not there to receive it; and before he can complain at the failure of the company to comply with the contract by giving him the notice, he must have first performed the contract impliedly imposed on him to put himself in position to receive the notice. He cannot complain when he has failed to perform his part of the contract, for, when he failed to make arrangements for the carrier to give him notice, he impliedly agreed for the latter to hold the goods until the bills of lading were presented by some one. This is what the law required the carrier to do, and he could expect nothing more.

“‘It is the duty of the consignee,’ says Mr. Hutchinson, ‘to be on hand and ready to receive the goods. He cannot absent himself, and thus put it out of the power of the carrier to make a delivery to him, and hold him during his absence to the extraordinary care of the goods required of the carrier. If, therefore, he

be absent when the carrier is ready to deliver the goods and has left no agent known to the carrier to whom delivery can be made for him, or to whom notice can be given of their arrival, the carrier becomes at once a mere warehouseman of the goods.' 2 Hutchinson on Carriers, § 723.

"The Supreme Court of Indiana, speaking on this subject, said: 'The doctrine that the carrier's duty to deliver and the consignee's duty to receive are reciprocal, and that each must be maintained, is approved by the plainest considerations of justice, and is necessary to prevent wrong and imposition.' *Adams Exp. Co. v. Darnell*, 31 Ind. 20, 99 Am. Dec. 582. The above quotations are taken from discussions of the general question as to when liability as a carrier ceases and that of a warehouseman begins; but the principle is the same in determining the question of liability of the carrier for failing to give notice, where damages are alleged to have resulted from such delay."

In *Normile v. Northern Pac. R. Co.*, 36 Wash. 21, 77 Pac. 1087, 67 L. R. A. 271, we held that, in the absence of information or instructions to the contrary, the agent of the carrier has the right to assume that notice addressed to the consignee at the point of destination would reach him in the due course of mail. It is apparent that a letter addressed to Rosenbaum either at Kenmare or Crosby would have served no purpose, as he was not at either place. As said in the *Townes* case, *supra*, "Any attempt to give him notice at Texarkana would have proved fruitless, for he was not there to receive it." The failure, therefore, to mail such letter was wholly without significance.

Moreover, in view of the arrangement between Rosenbaum and Trimble, the latter must be treated as the agent of the former for the purpose of receiving notice that the apples had arrived at Kenmare. Rosenbaum knew that Trimble was to be at Kenmare to receive the apples, and this was the reason for indorsing

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on the bill of lading the notation, "Stop at Kenmare, N. D. for partial unloading." The bill of lading with draft attached was forwarded to the bank at Kenmare with instructions to deliver the bill of lading to Trimble upon the payment of the draft. Trimble had knowledge of the arrival of the apples but failed to take up the draft. At the time of receiving this information the apples were in good condition, and it is not contended to the contrary. No claim is made that Trimble's failure to accept the apples was due to their damaged condition. Furthermore, it was not necessary for the carrier to notify the shipper of the arrival of the apples at Kenmare if he had actual knowledge of such fact. *Normile v. Northern Pac. R. Co.*, *supra*; 1 Moore, Carriers (2d ed.), § 10, and cases cited.

From the correspondence set forth at length herein, there is no room for difference in the minds of reasonable men that, as early as November 19, 1915, at least, the consignee knew the car was at Kenmare and that Trimble was seeking his permission to divert it to Thief River Falls. With this information in his possession, Rosenbaum could easily have given the agent at Kenmare such instructions with reference to the disposition of the apples as he saw fit, but having failed to give any such directions, it would be unconscionable and unjust thereafter to hold the carrier to its extraordinary liability as an insurer of the merchandise. The carrier exercised reasonable care in protecting the fruit from loss or damage, which discharged the full measure of its duty as a warehouseman. It is not contended that it was not necessary for the carrier to dispose of the apples to prevent loss by freezing, nor that in so doing it failed in its duty to secure the best price obtainable, plaintiff's case being based entirely upon the failure of the carrier to give notice to the consignee of the arrival of the goods at

Kenmare. The defendant having paid into the registry of the court the proceeds derived from the sale, less freight and demurrage charges, the plaintiff's recovery must be limited to that amount.

The judgment will be reversed, and the cause remanded with direction to enter judgment in favor of the plaintiff for the sum of \$129.54, together with costs incurred in the superior court. Appellant will recover costs in this court.

ELLIS, C. J., FULLERTON, MAIN, and PARKER, JJ., concur.

[No. 14432. Department One. April 18, 1918.]

CALVIN PHILIPS & COMPANY, *Appellant*, v. NEWOC
COMPANY, *Respondent*.¹

BROKERS — CONTRACTS — COMMISSIONS — RELEASE—ESTOPPEL—INITIAL MISTAKE. Plaintiff, a broker, is not estopped to deny a release from defendant's application for a loan and agreement to pay commissions, where the release was given by a clerk to another broker through a mutual mistake, and defendant's application to such other broker was made on such mutual mistake and therefore not binding on defendant; since the essential elements of an estoppel *in pais*—a benefit on the one side or injury or the other—are wanting.

SAME — CONTRACTS — CONSTRUCTION — PERFORMANCE—REASONABLE TIME. An agreement to pay a commission for a loan to be made "to or through" a broker, may be repudiated where the broker's sole claim of performance was through a certain principal who unreasonably delayed in furnishing the loan, and there was no allegation or proof that the broker might have furnished the loan itself or through some other principal.

SAME — CONTRACTS — PERFORMANCE — ACCEPTANCE. To recover a broker's commission for furnishing a loan, the broker must show an unqualified acceptance by its principal, and an acceptance subject to inspection is not sufficient.

SAME—CONTRACTS—PERFORMANCE—REASONABLE TIME—EVIDENCE—SUFFICIENCY. In an action to recover a broker's commission for

¹Reported in 172 Pac 355.

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negotiating a loan to the defendant, required by September 1st, the evidence fails to show that plaintiff performed its contract within a reasonable time, where it appears that only a conditional acceptance of the loan had been made by plaintiff's principal, until August 29th, when notice was mailed in the east, and it is immaterial that plaintiff, on August 14th, gave defendant a self-serving statement that the loan had been accepted contrary to the fact that the acceptance was a conditional one and not binding on the principal who was to make the loan.

EVIDENCE — PAROL EVIDENCE TO VARY WRITING — ADMISSIBILITY. Parol evidence is admissible upon an issue as to the reasonable time for the performance of a broker's written contract to procure a loan, where the question was one of fact that could only be determined by parol evidence as to the situation of the parties and their practical construction of the contract.

Appeal from a judgment of the superior court for King county, Tallman, J., entered April 28, 1917, upon findings in favor of the defendant, dismissing an action on contract, tried to the court. Affirmed.

E. L. Skeel and J. J. Geary (Roberts, Wilson & Skeel, of counsel), for appellant.

Herr, Bayley & Croson, for respondent.

ELLIS, C. J.—This is an action for a commission, claimed by plaintiff to have been earned under a contract to procure a loan on real estate.

Plaintiff was the resident financial correspondent of the Penn Mutual Life Insurance Company of Philadelphia, Pennsylvania. One R. G. Holt, the western fiscal agent of the insurance company, had headquarters at Denver, Colorado. It was Holt's duty to examine western properties offered as security for loans and report his approval or rejection to the home office at Philadelphia. Defendant was a Washington corporation. Charles Cowen was its president and principal stockholder. Frank S. Bayley was its secretary. It owned lot 20 and the south half of lot 21, in block 12,

of Brooklyn addition to Seattle. That property was subject to a mortgage for \$12,000, due September 1, 1916, which was controlled by John Davis & Company. The debt so secured was broken up into parts which were held by various debenture holders. John Davis & Company had notified defendant that this mortgage would be called at maturity and that defendant must signify an intention to make payment in time to assemble these debentures before maturity. The purpose of the loan here in question was to pay this existing mortgage. Plaintiff, at the time of the transaction here involved, was fully advised of these things.

Some time in May, 1916, defendant, through its president, Charles Cowen, began negotiations with plaintiff through its president, Calvin Philips, for the procuring of a loan upon the property above described for the purpose mentioned. The loan application and the commission agreement as parts of the same transaction were dated July 20, 1916, and were executed July 26, 1916. The application was made "to or through Calvin Philips & Co." so that the latter might lend its own money or the money of a third party. Neither the application nor the commission agreement contained any reference to the source from which the loan was to be procured, but it is admitted that, throughout the whole transaction, both before and after the application, no other source was contemplated by either party than the Penn Mutual Life Insurance Company. The application stipulated that the loan would be personally guaranteed by Charles Cowen, defendant's president. Defendant was advised that Holt must tentatively approve the application and security before the loan would be finally approved by the insurance company. Plaintiff's president testified that he informed Cowen that Holt would arrive in Seattle about the middle of August. Cowen testified that the

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promised time was early in August. After the application was taken, owing to Cowen's insistence on an early reply, Philips, on July 31, 1916, forwarded the application to Holt at Denver for his approval prior to inspection of the property. Holt replied in due course, stating that he had forwarded it to the home office with his recommendation that it be accepted "subject to inspection." The term "subject to inspection" was explained by plaintiff's president as follows: Plaintiff had a working agreement with the Penn Mutual Company whereby, to save time, applications would be submitted to that company before inspection of the security by Holt. An approval subject to inspection meant that plaintiff was authorized to close the loan on condition that if the property, when subsequently inspected by Holt, failed to meet his approval, plaintiff would buy the loan from the insurance company. On August 8, 1916, the insurance company's home office at Philadelphia approved the application "subject to inspection," and so informed plaintiff by a letter which was received at Seattle on Saturday, August 12, 1916. That letter, so far as here material, was as follows:

"We have received from Mr. Holt the application of The Newoc Company for a loan of \$13,500, 6%, repayable \$500 at the end of one year, \$1,000 at the end of two, three and four years, \$500 at the end of six, seven, eight and nine years, \$7,500 at the end of ten years, covering three story brick store and apartment building, 4230 14th Avenue, NE., lot 60 x 103 feet, Seattle, the borrower to have the privilege of doubling the above annual payments, and principal and interest to be guaranteed by Messrs. Chas. Cowen and Frank S. Bagley.

"This application has been approved upon the above basis and the loan will be made, if all things are found satisfactory, subject to investigation and return, and subject also to settlement at our convenience."

Plaintiff's office being unable to reach Cowen by telephone on Saturday, wrote defendant Monday, August 14, as follows:

"We have received from the Penn Mutual Life Insurance Company of Philadelphia, its approval of your application for a loan of \$13,500. The loan will be made if title and all things are found satisfactory."

On August 15, Cowen called at plaintiff's office and, on being told of the letter, stated that he had not received it and that he had made application to John Davis & Company for the money. That application was made under the following circumstances: On August 7, John Davis, desiring final assurance as to defendant's ability to take up the prior mortgage, at request of Cowen, who was then in Davis's office, called up plaintiff's office for information. Calvin Philips, Jr., a son of plaintiff's president, answered the call and Davis asked whether the loan to Cowen would be made. Philips Jr., having in mind another application made by one Cahen, which had been rejected, answered "no" and told Davis that if he so desired he could go ahead and make the loan himself, as plaintiff had turned it down. It was admitted that this was an error resulting from confusion in the mind of young Philips of the names "Cahen" and "Cowen." Davis reported that statement to Cowen, who then signed an application to John Davis & Company for a \$12,000 loan to replace the old mortgage.

As to what further transpired at the interview in plaintiff's office on August 15, plaintiff's president testified that Cowen said he would try to get Davis Company to release him from its application and would then submit his abstract of title to plaintiff for examination. Cowen denied this and further testified that, on August 10, he informed plaintiff that he would wait no longer for an answer, and that he maintained the

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same attitude at the meeting of August 15th. Some time later defendant, with the consent of John Davis & Company, secured a loan on the property in question from another source and paid off the prior mortgage. Holt arrived in Seattle August 18, 1916, examined defendant's property, and thereafter communicated with the home office of the insurance company, recommending the loan. On August 29, 1916, the home office of the insurance company wrote plaintiff as follows:

"After investigation of the security in connection with the following proposed loans, our committee has concluded to remove the 'subject' condition: The Newoc Company \$13,500, Manatawn Realty Company \$16,000."

When this letter was received by plaintiff does not appear, but in due course it must have been some days after the first of September.

In its complaint plaintiff alleges that, pursuant to the application and commission contract, it negotiated with the Penn Mutual Life Insurance Company to procure the loan; that the insurance company approved the loan application and agreed to make the loan if the title to the property should be found satisfactory as provided in the application; that it thereafter notified defendant of such approval and defendant refused to take the loan. Defendant answered, alleging failure of plaintiff to procure the loan in a reasonable time, withdrawal by defendant of its application, and release of defendant by plaintiff from the contract prior to the time of any notification by plaintiff of approval by the insurance company.

The trial was to the court without a jury. The court found that the application and contract were made on July 20, 1916, and provided no specific time limit for procuring the loan, but stipulated that defendant would not make application elsewhere until an adverse de-

cision by plaintiff; that plaintiff knew that prompt action was necessary because the loan was wanted to pay off the mortgage falling due September 1, 1916; that plaintiff informed defendant, at various times from July 20 to about August 7, that Holt was expected at any time, but Holt did not arrive until August 18; that, on August 8, 1916, the insurance company wrote plaintiff that defendant's application had been approved on certain conditions, among which was the condition that the loan should be guaranteed personally by Frank S. Bayley, and also subject to inspection, and that the application and loan were not finally approved and accepted by the insurance company upon any basis until August 29, 1916, at Philadelphia, Pennsylvania. The court further found that, during the negotiations, it was not understood that the money for the loan would come from any other source than the insurance company, and that plaintiff did not offer or agree to procure the loan from any other source; that the acceptance by the insurance company of the loan was not within a reasonable time after delivery of the application nor in accordance with its terms, and that, by reason thereof, plaintiff did not perform the terms and conditions contained in the application and commission agreement to be performed on its part. Finally, the court found the facts as above stated touching the conversation between Calvin Philips Jr. and John Davis, wherein, by reason of the confusion of the names of "Cowen" and "Cahen," Davis and defendant were led to believe that defendant was released from his application with plaintiff. As matters of law, the court concluded that plaintiff never performed its contract so as to earn the commission sued for, and that plaintiff was estopped by reason of the above mentioned conversation with Davis from claiming a commission, and that defendant was entitled to judgment

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dismissing the action. Judgment went accordingly. Plaintiff appeals.

Appellant's principal assignments of error and practically all of its argument are directed to the contention that the court's findings were not supported by the evidence and that the conclusions are contrary to the law.

Touching the question of estoppel, it is urged that appellant was not estopped to deny that it released respondent from its application and contract by the telephone conversation with John Davis on August 7. In this view we concur. In the first place, there was no privity between John Davis & Company, to whom the alleged release was made, and the respondent Newoc Company. In the second place, the information that the loan had been refused by appellant was based upon a mutual mistake of Calvin Philips Jr. and John Davis as to the identity of the loan concerning which they were talking. When, therefore, acting on that mistake, Davis induced respondent to make an application to John Davis & Company, that application was made on a misapprehension of the facts by both parties. As between respondent and John Davis & Company, therefore, the application to John Davis & Company was not a binding obligation. Respondent, on discovering the mistake, had a perfect right to repudiate that application without incurring any liability to John Davis & Company, and the transaction is, therefore, as between appellant and respondent, wanting in the essential elements of an estoppel *in pais*; viz., a benefit on the one side or an injury on the other. *Peck v. Peck*, 76 Wash. 548, 137 Pac. 137.

Appellant further contends that respondent had no right to repudiate the loan application and commission agreement on the ground that the Penn Mutual Life Insurance Company was unreasonably delaying its answer. This is on the theory that, since the application

was made "to or through Calvin Philips & Co.," appellant might have made the loan itself or might have procured it from some other source than the insurance company. The answer is that it never offered to nor bound itself to make the loan direct, and that there is neither allegation nor evidence that it ever attempted to procure, could have procured, or would have procured the loan from any other source. Its sole claim of performance was that it negotiated with, and finally procured consent to make the loan from, the insurance company. If appellant did not procure from the insurance company an unqualified approval of respondent's application within a time reasonable under the circumstances it did not earn its commission, since that is the only way in which it claims to have earned it.

The issue here is thus reduced to this: Did the appellant secure such an unqualified acceptance of the loan by the insurance company within a reasonable time as contemplated by the loan application and commission contract? As answering this question in the affirmative, appellant relies upon its notification to respondent by the letter of August 14 that the application had been approved and the loan would be made. If, however, the application had not, in fact, then been approved according to its terms, but only with added conditions not contemplated by the application, then it is plain that the letter of notification to respondent had no probative force to establish the requisite unconditional acceptance, hence no tendency to prove the earning of appellant's commission. That letter could only have such probative force when supplemented by proof that the insurance company had, prior to that time, actually accepted the application as made. Without such supplemental proof the letter to respondent was a mere self-serving declaration on appellant's part. No such supplemental proof was made. On the contrary, the

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letter from the Penn Mutual Life Insurance Company to appellant dated August 8, 1916, imposed the added condition not found in the application that principal and interest of the proposed loan should be guaranteed by Frank S. Bagley, evidently meaning Frank S. Bayley, who was secretary of respondent. This was not an acceptance of the application and did not bind the insurance company to make the loan as applied for, even subject to inspection of the property, yet it is the only acceptance or authorization to make the loan of which there was any proof prior to the final unconditional acceptance of August 29 removing the subject to inspection condition. Even that letter does not purport to remove the requirement of the former letter that the loan be guaranteed by Bayley. It is true that appellant's president testified that the last mentioned condition was a mistake which was later corrected by the insurance company, but no letter or telegram was offered in proof of such correction and there is nothing whatever in the evidence to show when, if ever, that correction was made. The burden was upon appellant to show a timely authorization to make the loan as applied for. A mere general statement that the requirement that Bayley should guarantee the loan was a mistake which was "later" corrected was not such proof. The time and manner of such correction, if ever made, was peculiarly within appellant's knowledge. As a part of its proof of an acceptance of the loan by the insurance company within a reasonable time it was incumbent upon appellant to show that that correction was made within such reasonable time. It is true also that respondent did not know of the conditional form of the acceptance and sought to withdraw its application before it discovered the truth. It may be conceded also that respondent had no right to withdraw the application till a reasonable time had expired.

The attempted withdrawal, however, neither hastened nor retarded the acceptance of the application by the Penn Mutual Company. The vital point is that appellant is seeking in this action to recover as for a commission actually earned; it must show, therefore, an actual acceptance within a reasonable time, regardless of respondent's knowledge or lack of knowledge as to the character of the acceptance which was actually secured.

Moreover, the approval of the insurance company embodied in its letter of August 8, in addition to requiring a guaranty not called for in the application, was only an approval subject to inspection. Obviously such an acceptance or approval would bind nobody to make the loan. It would be in no sense binding as between the applicant for the loan and the insurance company until actual inspection and acceptance by its fiscal agent, Holt, of the security offered, or until appellant itself had actually made the loan without such inspection and acceptance. Appellant's notice of August 14 to respondent was not an offer on its own part to make the loan. Even if it could be so construed, it contained the saving clause "if title and all things be found satisfactory." It did not bind the insurance company to respondent to make the loan, because that company had only authorized an acceptance subject to inspection and approval of the security, which was, for practical purposes, no acceptance. It did not bind appellant to make the loan, because it contained no promise or claim that appellant or any one, save the Penn Mutual Life Insurance Company, would make it, and that only *if all things were found satisfactory*. Appellant was taking no risk of the loan being refused by the insurance company's fiscal agent, Holt. Whether intentional or not, it was apparently attempting to lead respondent to take that risk without frankly divulging the fact that

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there was such a risk. These considerations make it too plain for cavil that the court's finding of fact that the application and loan were not approved and accepted by the insurance company, so far as respondent was concerned, on any basis until its letter of August 29, 1916, at Philadelphia, Pennsylvania, was amply supported by the evidence. That acceptance, in the nature of things, could not have been communicated to respondent at Seattle until some time after September 1, 1916.

The court's further finding that no acceptance of the loan by the insurance company was made within a reasonable time is also amply sustained. The evidence clearly shows not only that appellant was fully advised before taking the application of respondent's purpose in seeking the loan; viz., to take up the prior mortgage maturing September 1, 1916, but also shows that both parties, by their subsequent conduct throughout, recognized that only an acceptance communicated to respondent in time to enable it to close the loan and make the necessary arrangements to pay off the prior mortgage on or about its maturity would be an acceptance within a reasonable time.

Appellant argues that evidence of these things was inadmissible as tending to vary the terms of the written contract. The case of *Hoffman v. Tribune Pub. Co.*, 65 Wash. 467, 118 Pac. 306, is cited in this connection. As we read it, however, that decision is not in conflict with the views here expressed. There the written contract was construed as a contract to furnish machinery within a reasonable time. Defendant, in that case, attempted to show a contemporaneous, collateral, oral agreement that the delivery was to be made within four weeks and, as the opinion says, "irrespective of the question whether that period was or was not a reasonable time." We held that this was an

attempt to vary the written contract by oral evidence, rather than to prove what was a reasonable time, but we also said:

“What constituted a reasonable time was a question of fact which appellant was entitled to show by competent evidence. The trial judge expressed and announced his willingness to admit such evidence.”

As we view it, that is what was done in this case. What is a reasonable time being a question of fact, it could only be determined by parol evidence as to the situation of the parties, the purpose of the contract, and the practical construction put upon it as shown by the subsequent conduct and declarations of the parties. *Alexander v. Sherwood Co.*, 72 W. Va. 195, 77 S. E. 1027, 49 L. R. A. (N. S.) 985, and note p. 995; *Alford v. Creagh*, 7 Ala. App. 358, 368, 62 South. 254; *Cotton v. Cotton*, 75 Ala. 345; *Cocker & Co. v. Franklin Hemp & Flax Mfg. Co.*, Fed. Cas. No. 2,932; *Biddison v. Johnson*, 50 Ill. App. 173; *Geiger v. Kiser*, 47 Colo. 297, 107 Pac. 267; *Smith Sand & Gravel Co. v. Corbin*, 81 Wash. 494, 142 Pac. 1163.

Appellant's president testified:

“I knew of the mortgage which fell due on September 1st and that Mr. Cowen would have to have action in ample time for that mortgage to be met at maturity. . . . We did not tell him that Mr. Holt would be here early in August. I believe we told him the middle of August. Mr. Cowen came in every two or three days and we kept him posted as to the progress in the matter. After Mr. Cowen signed the application he frequently pressed us for an answer.”

The record is replete with testimony showing that appellant was throughout conceding that an acceptance too late to close the loan in time to enable respondent to meet the prior mortgage would not be an acceptance within a reasonable time.

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Syllabus.

We are clear that the court committed no error in making the last two findings complained of. It follows that appellant failed in an essential element of proof, in that it did not establish as a fact that it had procured the unqualified consent of the insurance company to make the loan within a reasonable time under the circumstances of this case, and, therefore, failed to prove that it had earned the commission claimed. The judgment is affirmed.

WEBSTER, FULLEBTON, MAIN, and PARKER JJ., concur.

[No. 14551. Department Two. April 18, 1918.]

HARRY P. ECUYER, *Appellant*, v. NEW YORK LIFE
INSURANCE COMPANY, *Respondent*.¹

LIBEL AND SLANDER—SLANDER PER SE—WORDS IMPUTING OFFENSE—INJURY IN BUSINESS. Charges by a life insurance company that its cash clerk had stolen money, made to the clerk's father, and statements to others to whom the clerk subsequently applied for employment that he had been careless in keeping his cash, or was short in his accounts, or that his accounts were not exactly right, thereby preventing his employment, are slanderous *per se*, unless true or privileged, as words importing to him a criminal offense involving moral turpitude for which he might be prosecuted, and as defamatory words prejudicing him in his business or profession.

SAME—TRUTH—QUESTION FOR JURY. In an action against a life insurance company for slander in charging plaintiff, its cash clerk, with stealing money, the truth of the charge is not established, as a matter of law, by proof that he receipted for the money and his cash books and slips showed that he had not accounted for it, but the question is for the jury, where plaintiff denied the charge and any memory of receiving the money and his cash drawer was accessible to other clerks in the common office room, who might have taken the money and cash slips.

SAME—PRIVILEGE—CHARGES MADE TO PARENT. Charges by an insurance auditor that a cash clerk of the insurance company had stolen money, made at an interview with the clerk at which his

¹Reported in 172 Pac. 359.

father was present by his consent, are only qualifiedly privileged, and the facts not being disputed, the question of privilege is one for the court.

SAME—PRIVILEGE—QUESTION FOR JURY. In such a case, whether the privilege of the occasion was exceeded depends on the good faith of the charges, and is for the jury, where the charge was not confined to the admitted facts that the clerk was short a small sum in his accounts, and it appeared that others in the office might have stolen the money from his cash drawer, and he persistently denied taking the money and refused to repay it; since the charges, under the circumstances, might have been made to coerce the payment.

SAME—PRIVILEGE—BUSINESS REFERENCE. A communication made by the manager of an insurance company, upon a business reference, to another company contemplating the employment of a discharged employee, is one of qualified privilege, which is not exceeded when strictly confined to the facts that such employee had been discharged because short in his accounts and had been at least careless.

SAME—DEFENSE—TRUTH. The truth of a statement that a clerk had been discharged because short in his accounts is a complete defense to a charge of slander, regardless of the question of privilege.

Appeal from a judgment of the superior court for King county, Frater, J., entered August 17, 1917, upon granting a nonsuit, dismissing an action for slander, tried to the court and a jury. Reversed.

James R. Chambers, for appellant.

H. T. Granger (*James H. McIntosh*, of counsel), for respondent.

ELLIS, C. J.—This is an action for slander. Defendant, New York Life Insurance Company, has its principal office in New York City. Throughout the United States and Canada it has branch offices. Through these offices new business is written and premiums on current and renewal policies are collected. One A. S. Elford was in charge of the Seattle office and, as inspector of agencies, had general supervision over other branch offices in Oregon, Washington, Montana, Utah, British Columbia and Alberta, Canada. One C. C.

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Norton was cashier of the Seattle office. One S. S. Buxton was traveling auditor for the company. It was his business to visit all branch offices, audit and check up their financial operations, accounts and books. Plaintiff, a man twenty-five years of age at the time of the alleged slander, was what is known as the first bonded clerk in the Seattle office. One Sparre was what is known as the second bonded clerk. The principal duty of these two clerks was the collection of premiums. Each had a cash drawer and kept his own cash book. Premium receipts would be forwarded by the home office to the Seattle office for collection. The collections were many, sometimes running as high in volume as ten thousand dollars a day. Plaintiff and Sparre did most of the collecting, though the cashier and what is known as the cash sheet clerk also made collections. When plaintiff or Sparre made a collection, he would countersign the receipt, place the money in his cash drawer, make a memorandum of the collection and attach it to the particular premium card, place this in a drawer or box and from these, later in the day, write up his cash book. Each afternoon the cash was counted to see if it balanced with the cash book, and a cash sheet was made from the cash and the cash books. No one else than plaintiff had a key to plaintiff's cash drawer except the cashier, Norton. There was evidence, however, showing that it was the practice during business hours to leave the keys in the locks of the cash drawers. Sometimes the drawers were not tightly closed, so that it was physically possible for any of the employees to have taken money from plaintiff's cash drawer if so inclined.

On April 11, 1916, Buxton, the traveling auditor, appeared and checked up the Seattle office. He produced two receipts for the premiums, one for \$32.30 and one for \$4, which were countersigned with plaintiff's name.

Where he procured these receipts does not appear in the evidence. Plaintiff, however, admitted that the signatures were his. The cash book for the day on which these receipts were given showed no corresponding entries. Buxton and Norton called plaintiff's attention to the discrepancy, showed him the receipts, indicated that the money did not appear on the cash book, charged plaintiff with having taken it, and demanded payment. Plaintiff told them that he had no independent memory of making these collections and did not know what became of the money, but positively denied that he took it. The only explanation he gave of failure to make the entries on the cash book was that the collection slips were not attached to the premium cards and that the money was not in the cash box when the cash book was written up for that day. Whether he ever made slips for these collections he had no memory. If he did, what became of them was, and is, wholly unexplained.

After a long conference in which Buxton endeavored to get plaintiff to admit that he had taken the money and urged him to give a list of other sums which Buxton assumed he had taken, Norton suggested that plaintiff have his father, with whom he lived, come to the office and talk the matter over. Plaintiff demurred, Norton insisted, and plaintiff finally consented. Norton thereupon called plaintiff's father by telephone and he came to the office late in the afternoon. The premium receipts and cash book were shown to him, and in the course of the conversation, both Norton and Buxton repeatedly said to him:

"Harry is short in his money. . . . He has been using the company's money. . . . Harry is short in his accounts. . . . He has been taking the company's money. . . . Harry has stolen the money. . . .

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Harry has stolen the company's money. . . . What has Harry used this money for that he has taken?"

On plaintiff producing his personal bank book and calling attention to the fact that it showed no abnormal deposits at the time in question, Buxton answered in the father's presence: "If you wanted it bad enough to steal it you would not deposit it." Buxton again, in the presence of the father, asked for a list of the sums he had taken, and said:

"We had a boy in an office that had been stealing money and I asked for a list of the money he had taken so as to save me time. I wish Harry would do the same."

and further

"You go home and think the matter over and give me a list of the other items you have taken."

Plaintiff's father asked if it would seem possible that plaintiff would steal so small an amount. Buxton replied: "O well, that is the way they all start." Plaintiff repeatedly told Buxton that he had taken no money and would make no such list. When asked to pay the money back, plaintiff stated he would not pay it, that he had not taken it, and would just as soon throw it in the bay. Buxton and Norton threatened to notify the bonding company which was surety on plaintiff's bond, and intimated that the surety company would prosecute the plaintiff if he did not pay the money. He still refused. At the close of this interview plaintiff was discharged. He went home with his father, and on the following day the father, as he testified against plaintiff's desires, returned to the office and paid the amount of the shortage.

Later, in the same month of April, 1916, plaintiff applied to Herbert H. Ward, business manager of the Pacific Mutual Insurance Company of California in

the Pacific Northwest, with offices at Portland, Seattle and Tacoma, for employment with that company. Ward testified that he proposed to plaintiff that he, Ward, see Norton of the New York Life Insurance Company as to plaintiff's fitness for the place. To this, plaintiff assented. Ward accordingly called on Norton at the Seattle office, who informed him that the office had been checked up by a traveling auditor who had found things which made it impossible to give plaintiff an unqualified reference. On Norton's suggestion Buxton was called in and stated that plaintiff had been at least careless in his work; that, when he checked plaintiff, there was an item of some thirty-four dollars, more or less, short, and referred to another item of four dollars; that Buxton stated that plaintiff had been careless in his work, had left his keys in the cash drawer containing two or three hundred dollars in cash; that, if a man wanted to steal, that would be one way to do it. He stated that plaintiff was short in his money, also short in his accounts. As a result of the talk, Ward did not employ plaintiff, advising him that he would not do so without a "clean bill of health" from the New York Life Insurance Company.

One G. R. Johnson testified by deposition that, in April, 1916, he was cashier of the New York Life Insurance Company's branch office at Calgary, Alberta, Canada; that, on April 22, 1916, Buxton was auditing that office and spoke to Johnson of plaintiff, saying he was short in his accounts and, in substance, that he had received cash for premiums and did not turn the money into the company nor report it. The witness explained that this was said in connection with advice to Johnson to keep separate cash drawers for himself and for his clerk; that, when Buxton was informed that, in the Calgary office, only one cash drawer was used, he brought up the matter of the shortage in the

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Seattle office. On being asked if the information given by Buxton was that plaintiff himself had taken the money, Johnson answered, "His accounts were short, yes, sir. He did not charge it to any of the clerks."

In April and May, 1916, one E. J. Englehardt was cashier of the branch office of the New York Life Insurance Company at Butte, Montana. This office was under the supervision of A. S. Elford, manager of the Seattle office and inspector of agencies for the northwest. Englehardt testified by deposition that, in April or early in May, 1916, Elford was in the Butte office when the witness had a conversation with him in reference to plaintiff, with whom witness was acquainted. Witness could not recall exactly what was said, but stated that he inferred from what Elford said that plaintiff's accounts were not exactly right. In connection with Englehardt's deposition, a letter from Englehardt to plaintiff was offered, in which Englehardt wrote to plaintiff touching this conversation: "He said you were let out because of a shortage in your accounts."

Plaintiff charged as libelous, (1) the statements made on April 11, 1916, through defendant's agents Norton and Buxton in the presence of plaintiff's father; (2) the statement made on or about April 15, 1916, through defendant's agents Buxton and Norton to Ward, thereby preventing plaintiff from securing employment with Ward's company; (3) the statement made at Butte, Montana, on or about April 22, 1916, through defendant's agent Elford to Englehardt; and (4) the statement made at Alberta, Canada, on or about April 22, 1916, through defendant's agent Buxton to Johnson. He claimed damages in the sum of \$60,000.

Defendant in substance answered, (1) that Buxton, on discovering the shortage in plaintiff's accounts, de-

manded that plaintiff make it good; that, on the evening of April 11, 1916, the facts were related in the presence of plaintiff's father, and the statements then made by defendant's representatives were made in good faith, in the honest belief that they were true, and that they were made without malice or intent to injure plaintiff; (2) that the communications made to Ward were privileged, being made in good faith, in the honest belief that they were true, without malice, in strict confidence, and were not volunteered, but were made in response to an inquiry from Ward; (3) that the statements alleged to have been made by Elford and Buxton, subsequent to the conversation of the evening of April 11, 1916, in the Seattle office, were not made by these persons as representatives of defendant or with its authority. Plaintiff, by reply, traversed all affirmative matter in the answer.

The case went to trial to a jury. At the close of the plaintiff's evidence, defendant challenged its sufficiency by motion for nonsuit, which was granted. The action was dismissed, and plaintiff appeals.

In this state we have no statute defining slander generally. We shall not attempt a comprehensive definition of slander as it is recognized at common law. It will suffice here to say that words falsely spoken of a person which impute to him some criminal offense involving moral turpitude for which he, if the charge were true, might be indicted and punished, and defamatory words falsely spoken of a person which in themselves prejudice him in his profession, trade or vocation, are slanderous and actionable *per se*. Newell, Slander & Libel (2d ed.), pp. 38-41. It is obvious, therefore, that all four of the utterances here charged as slanders were slanderous *per se*, unless they were either true or privileged. Appellant contends that neither of them was either true or privileged. Re-

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spondent insists that all were true, and all were privileged whether true or not. To avoid confusion we shall consider the first and second charges separately.

I. Was the truth of the first charge established? The truth of the communication is a complete defense to the civil action for libel or slander. But defamatory words are presumed to be false until proven to be true. The onus of such proof lies on the defendant. *Odgers, Libel & Slander* (3d ed.), p. 192. This matter of defense, as in other cases where a judgment of nonsuit is asked, may be established by the plaintiff's own evidence. The words charged as slanderous in the first communication were proven to have been published by utterance to and in the presence of appellant's father. They were direct, unequivocal and repeated charges that appellant had stolen the money then missing and other unnamed sums. So far as the evidence shows, the whole truth was that the receipts showed that appellant had collected the money and his cash book showed that he had not accounted for it. Had the offending communication been confined to a statement of those facts the evidence, which conclusively established their truth, would have made a complete defense. But it was not so confined. He was charged with stealing the money. That charge was not established by such a degree of proof that any court would be justified in saying that the minds of reasonable men might not differ as to its truth. The question was one for the jury. Appellant denied that he took the money, the key was in the lock of the cash drawer, the room was the common office room of many employees, any one of whom might have taken the money and the corresponding memorandum slips. The evidence was conclusive of appellant's carelessness but not of his dishonesty.

Was the occasion of the first communication privileged, and if so, was there any excess of the privilege?

If privileged at all, it needs neither argument nor citation of authority to show that the privilege was not absolute, but qualified or imperfect. The rule of qualified privilege is this: Where the communication is prompted by a duty to the public or to a third person, or is made touching a matter in which the party making it has an interest to another having a corresponding interest, it is privileged if made in good faith and without malice. *Fahey v. Shafer*, 98 Wash. 517, 167 Pac. 1118. Though malice is the gist of the criminal charge of libel (*State v. Sefrit*, 82 Wash. 520, 144 Pac. 725), it is not ordinarily an essential element in the civil action for slander or libel. *Wilson v. Sun Pub. Co.*, 85 Wash. 503, 148 Pac. 774, Ann. Cas. 1917B 442. But this is not true in cases involving the qualified privilege. In such cases, actual malice must be proved, and the onus of proof is upon the plaintiff. *Fahey v. Shafer, supra*. Where it is not disputed that the words were uttered, the question whether the occasion was privileged is one for the court; whether *bona fides* existed in the statement made or whether it was malicious is usually a question of fact for the jury. *Moore v. Butler*, 48 N. H. 161. This the jury must determine from the language itself and the surrounding circumstances.

“The meaning in law of a privileged communication is that it is made on such an occasion as rebuts the *prima facie* inference of malice arising from the publication of matter prejudicial to the character of the plaintiff, and throws upon him the *onus* of proving malice in fact, but not of proving it by extrinsic evidence only. He has still a right to require that the alleged libel itself shall be submitted to the jury, that they may judge whether there is any evidence of malice on the face of it. . . . The effect, therefore, of showing that the communication was made upon privileged occasion is *prima facie* to rebut the quality or element

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of malice, and casts upon the plaintiff the necessity of showing malice in fact,—that is, that the defendant was actuated by ill will in what he did and said, with a design to causelessly or wantonly injure the plaintiff,—and this malice in fact, resting, as it must, upon the libelous matter itself, and the surrounding circumstances tending to prove fact and motive, is a question to be determined by the jury. The question whether the occasion is such as to rebut the inference of malice if the communication be *bona fide* is one of law for the court; but whether *bona fides* exist is one of fact for the jury.” *Bacon v. Michigan Cent. R. Co.*, 66 Mich. 166, 33 N. W. 181.

See, also, *Nichols v. Eaton*, 110 Iowa 509, 81 N. W. 792, 80 Am. St. 319, 47 L. R. A. 483; *Fresh v. Cutter*, 73 Md. 87, 20 Atl. 774, 25 Am. St. 575, 10 L. R. A. 67; *Abraham v. Baldwin*, 52 Fla. 151, 42 South. 591, 10 L. R. A. (N. S.) 1051; *Brow v. Hathaway*, 13 Allen (Mass.) 239.

In the record before us, there is no dispute as to the fact of the father's presence when the offending words were spoken, nor as to why he was there. The question of privilege was, therefore, one for the court. It is generally held that communications made to, or in the presence of, a parent of a minor touching the minor's conduct, by reason of the parent's interest, are qualifiedly privileged if made fairly and in good faith. This is especially true if the interview be sought by the parent. *Long v. Peters*, 47 Iowa 239; *Moore v. Butler*, *supra*. The same rule has been applied, and we think soundly, where the child, though an adult, is a female living with and under the care and protection of the parent. *Rosenbaum v. Roche*, 46 Tex. Civ. App. 237, 101 S. W. 1164. In other cases, except where the communication was invited or acquiesced in by the traduced person himself, it is no more privileged when made to parents or other kindred than if made to strangers.

Miller v. Johnson, 79 Ill. 58; *Davis v. State*, 74 Tex. Cr. 298, 167 S. W. 1108, L. R. A. 1915A 572; *Thorn v. Moser*, 1 Denio (N. Y.) 488; *Rose v. Imperial Engine Co.*, 110 App. Div. 437, 96 N. Y. Supp. 808. But where the interview in the presence of others was either invited or consented to by the person claiming to have been defamed, the occasion is qualifiedly privileged whether such persons be strangers or kindred. *Christopher v. Akin*, 214 Mass. 332, 101 N. E. 971, 46 L. R. A. (N. S.) 104, and note. Appellant did not invite his father's presence at the interview in respondent's office but he consented to it, reluctantly it is true, but without coercion. He was a man of full age and intelligence. His consent must be held voluntary. We think the occasion was one of qualified privilege, and so hold.

Whether the privilege of the occasion was exceeded depends upon the good faith of the charges made. This, as we have shown, is to be determined from the character of those charges in the light of all of the known circumstances. Had the charge been confined to the admitted facts with the legitimate deduction that he was short in his accounts, we would be able to say, as a matter of law, that the communication was not in excess of the privilege. But inasmuch as these facts were explicable on another hypothesis than that appellant stole the money, others in the office having at least potential access to his cash drawer, and in view of the further fact that he persistently denied having taken the money himself, we cannot say, as a matter of law, that the direct unqualified charges of larceny, not only of this but of other money, repeatedly made, was not in excess of the privilege of the occasion. If the charges of theft were made under an honest suspicion that appellant had stolen the money, the privilege of the occasion was not exceeded, but if they were made to coerce payment by the father, or with any

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other sinister purpose, the privilege was exceeded. "This is not a lawful method of collecting a debt or of compelling another person than the debtor to pay it." *Beals v. Thompson*, 149 Mass. 405, 21 N. E. 959. Either of these inferences might be drawn by the jury from the facts. The question of malicious excess of privilege was, under the evidence before us, one for the jury under proper instruction.

II. The occasion of the communication to Ward was clearly one of qualified privilege. Appellant had applied to Ward for employment. Ward had an interest which prompted him to inquire of appellant's former employer as to his fitness for the employment. Statements made under such circumstances are universally held to be qualifiedly privileged. We have carefully considered the evidence touching the communication made to Ward by respondent's agents Buxton and Norton. We are satisfied that the privilege was not exceeded. They stated the facts truthfully and said that appellant had been at least careless. There is no evidence that they directly charged appellant with theft or that the words used were designedly capable of that construction, however Ward may have construed them.

III. The other two communications charged in the complaint as slanderous fall in the same category. We find it unnecessary to determine whether either of them was privileged or not. The evidence shows that the statement made by Buxton to Johnson at Calgary was made by way of caution and to illustrate the advisability of having an individual cash drawer for each collector. The statement went no further than that appellant was short in his accounts and that none of the clerks was charged with the theft. The evidence of the statement to Englehardt made by Elford at Butte was extremely vague; but even assuming that

it was precisely what Englehardt wrote to appellant; viz., "He said you were let out because of a shortage in your accounts," it was confined to the exact truth. As we have seen, the truth of the offending statement is a complete defense regardless of the question of privilege.

The judgment is reversed, and the cause is remanded for a new trial in accordance with this opinion.

CHADWICK and HOLCOMB, JJ., concur.

[No. 14569. Department One. April 18, 1918.]

THE STATE OF WASHINGTON, *on the Relation of August Havercamp et al., Plaintiff*, v. THE SUPERIOR COURT FOR KING COUNTY, *Respondent*.¹

EVIDENCE—DOCUMENTARY EVIDENCE—RECORDS. Copies of records certified by a deputy county auditor are not inadmissible because not certified by the auditor; the act of his deputy being his act.

SAME—DOCUMENTARY EVIDENCE—MAPS AND PLATS. A plat made by a deputy county engineer, based on his own field notes, is admissible in evidence, under Rem. Code, § 3975.

HIGHWAYS—ESTABLISHMENT—AUTHORITY OF COUNTY COMMISSIONERS—JURISDICTION—COLLATERAL ATTACK. County commissioners having general jurisdiction of the establishment of county roads by virtue of Rem. Code § 5623-1 *et seq.* and having acquired jurisdiction by petition and notice as required by Id., § 5633, to establish a certain road, their jurisdiction cannot be attacked collaterally by certiorari proceedings to review an order adjudicating a public use and necessity for appropriating lands for the road.

SAME—ESTABLISHMENT—CHANGE OF ROUTE. Under Rem. Code, § 5627, empowering the county engineer to survey any other route for a county road than that petitioned for, the county commissioners may, after notice and hearing thereon, adopt a change in the route petitioned for; and reference to the former terminal points is no longer jurisdictional, in view of Id., §§ 5623-2 and 5623-3, empowering the commissioners to establish any road without petition or adopt any route found most practicable.

¹Reported in 172 Pac. 254.

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Certiorari to review an order of the superior court for King county, French, J., entered November 12, 1917, adjudging a public use and necessity in condemnation proceedings for a county road. Affirmed.

Vince H. Faben, for relators.

Alfred H. Lundin, Edwin C. Ewing, and William J. Steinert, for respondent.

ELLIS, C. J.—Proceeding in certiorari to review an order of the superior court of King county adjudicating the public use and necessity for the appropriation of lands of relators for a county road.

The petition for the road is not in the record, but there is in the record the original order of the board of county commissioners establishing the road, which order recites that, on February 10, 1914, the required number of householders petitioned the board to establish a county road:

“Commencing at the northwest corner of the northeast quarter of the northwest quarter of said section 16, township 24 north, range 5 east, W. M., running thence due south as near as possible to intersect with the Newport-Issaquah Road.”

The petition was accompanied by a bond as required by Rem. Code, § 5623-5 and § 5626. Thereafter the county engineer examined the proposed route and, on August 15, 1916, filed his report, together with a map and field notes of his survey, recommending the establishment of the road as above described. A hearing was had on this report pursuant to notice to the property owners, and the board of county commissioners, on October 9, 1916, entered an order establishing the road. On December 1, 1916, the county filed its petition in the superior court to condemn the land for a right of way on the route described. The relators herein and the other property owners whose lands

were affected were made parties to that action. On February 26, 1917, an order was entered dismissing the condemnation proceeding as to the relators herein and another party with whom we are not concerned. As to the remaining landowners, the cause proceeded to trial, a verdict was returned, judgment rendered and a decree of appropriation entered therein. By that proceeding the county acquired the right of way for the road from the initial point to a point on the northerly line of relators' land.

On April 12, 1917, the county engineer, having recommended a revision in the alignment of the proposed road across relators' land, filed with the board amended field notes and an amended report upon that portion of the road. We find it unnecessary to set out the description of the road as so changed. It will suffice to say that it changed the course from the original survey across relators' land from an almost direct line making a connection with the Newport-Issaquah road to a southeasterly course connecting with the Newport-Issaquah road three or four hundred feet easterly from the original proposed point of connection.

On May 28, 1917, upon a hearing pursuant to notice to the relators, the board, by order, declared its decision that the road should be established as recommended in the amended report. The provisions of the statute relative to notice, awards for damages, etc., were all complied with. Thereafter the county filed a second petition in the superior court seeking to condemn the right of way so adopted across the land of relators. The matter came on before respondent Judge Walter M. French, sitting as visiting judge in King county, for preliminary hearing on November 12, 1917. The court entered an order adjudicating a public use and necessity for the appropriation of the land for a

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highway, and set the cause for trial by jury on December 10, 1917, to determine the compensation for the land to be taken. Relators appeared at this preliminary hearing, asserting that their appearance was special for the purpose of objecting to the jurisdiction of the court. They participated in the hearing, however, introduced evidence and cross-examined all of the witnesses for the other side. They excepted to the order and moved for new trial, which was denied. Thereupon they instituted this proceeding in this court to review the action of the trial court.

Relators have made five assignments of error. One of these challenges the admissibility, as evidence, of a certified copy of the record of the proceedings before the board of county commissioners and of a plat made by the deputy county engineer. The first of these was objected to because it was certified by the deputy county auditor instead of the county auditor. We see no merit in this objection. The act of the deputy is the act of the auditor for which the auditor is responsible. Rem. Code, § 3925. The plat was also properly admitted. It was shown by the deputy county engineer that it was based upon the field notes of the survey made under his own direction. Rem. Code, § 3975.

The other assignments of error are all directed to the main contention of the relators, which, if we have caught counsel's meaning, is this: That the jurisdiction of the board of county commissioners to establish a road can only be invoked by petition; that the revised alignment of the road across relators' land as contained in the engineer's amended report and adopted by the board upon the hearing of May 28, 1917, was insufficient to confer jurisdiction upon the board to adopt that alignment, in that no new petition was filed and the southerly terminus of the road was shifted;

that, therefore, the court was without jurisdiction to entertain the preliminary proceedings in condemnation to determine the questions of public use and necessity.

There are two sufficient answers to this argument. In the first place, the county commissioners had, under the statute, jurisdiction of the general subject-matter; viz., the establishing of roads. Rem. Code, § 5623-1 *et seq.* The commissioners, in the exercise of this jurisdiction, by their original order of October 9, 1916, made upon a hearing after having acquired jurisdiction of the persons whose property would be affected, by notice as required by law, Rem. Code, § 5633, found that, on February 10, 1914, a petition signed by the required number of householders had been presented, together with the bond required by law. The bond itself appears in the record. So far as the record shows, no proceeding of any kind was ever instituted to review this order. It cannot be attacked collaterally in this proceeding. *State ex rel. Pagett v. Superior Court*, 47 Wash. 11, 91 Pac. 241; *State ex rel. Murhard Estate Co. v. Superior Court*, 49 Wash. 392, 95 Pac. 488. On the record before us it must be taken as true. It is obvious, therefore, that, even upon relators' assumption that the petition is jurisdictional, the jurisdiction of the commissioners to establish the road was amply established.

Relators' assertion that the commissioners had no jurisdiction to enter the order of May 28, 1917, in that no new petition was filed requesting the change, has no foundation in the present law. The statute, Rem. Code, § 5627, empowers the county engineer to survey any other route than that described in the petition which will subserve the same purpose, and make a report thereon. He is not even required to observe the terminal points proposed in the petition. His

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amended report was authorized by this section. Notice of a hearing on this report was given to relators as required by § 5633, a hearing was had thereon, and the order adopting the change was entered in all respects as required by § 5634. The statute plainly gives to the commissioners a broad latitude to adopt, upon the recommendation of the engineer and on notice and a hearing, the most feasible route for the road which will subserve the same purpose as the route described in the petition, and this without any new petition so requesting. In proceedings under the law in force now and when these proceedings were had, contrary to those under the old territorial statute, the petition is not relied upon as notice to the landowners as to the exact route the road will finally take. Specific notice to the landowner is now given and he is accorded a hearing by the board on that question. The reference in the petition to terminal points and course is no longer jurisdictional. *Chelan County v. Navarre*, 38 Wash. 684, 80 Pac. 845.

In the second place, the petition is now in no sense jurisdictional. By the act of 1911, Rem. Code, § 5623-2, the commissioners themselves are empowered by unanimous vote to initiate the proceedings to establish any road without any petition, and under § 5623-3 may, after notice and a hearing, adopt any route therefor found most practicable by the engineer. There was evidence that the commissioners were unanimous in the relocation of the road here involved. In every view of the matter, therefore, the commissioners were proceeding within their plain statutory powers when they established this road. We cannot review their proceedings in a search for mere irregularities in this case where they are only collaterally involved. *State ex rel. Pagett v. Superior Court*, *supra*; *State ex rel. Murhard Estate Co. v. Superior Court*, *supra*. The sole

question here is that of public use, and it is elementary that use for a public highway is a public use. The court had jurisdiction of the subject-matter and acquired jurisdiction of the persons of relators by proper service.

The order under review is affirmed. The stay of proceedings pending this hearing, heretofore granted by this court, is vacated.

FULLERTON, PARKER, MAIN, and WEBSTER, JJ., concur.

[No. 14677. Department One. April 18, 1918.]

CHAUNCEY WRIGHT, *Respondent*, v. SEATTLE GROCERY COMPANY, *Appellant*.¹

APPEAL—BOND—OBLIGEE—ASSIGNEE OF JUDGMENT. Under Rem. Code, § 193, providing that "no action shall abate by . . . the transfer of any interest therein," and allowing substitution, it is not essential to serve notice of appeal upon an assignee of a judgment, or that he be named in the bond on appeal, where he had not been substituted as a party to the action; since he was not the "prevailing" party, and his rights as an assignee are in no manner affected by the failure to name him in the bond.

Motion to dismiss an appeal from a judgment of the superior court for King county, Ronald, J., entered November 3, 1917. Denied.

Elias A. Wright and *Sam A. Wright*, for appellant.

Leopold M. Stern and *J. W. Russell*, for respondent.

WEBSTER, J.—Motion to dismiss appeal upon the ground that the assignee of the judgment appealed from, though duly served with notice of appeal, was not named as the obligee in the appeal and supersedeas bond executed pursuant to statute.

In the superior court respondent obtained a judgment against the appellant which he thereafter as-

¹Reported in 172 Pac. 345.

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signed to Prudential Surety Company, Incorporated. This assignment was filed with the clerk prior to the taking of the appeal. Although the notice of appeal was served upon both the respondent and his assignee, the latter was not named as obligee in the appeal and supersedeas bond given for the purpose of perfecting the appeal. The motion to dismiss the appeal is made by the assignee, who has not been substituted as a party to the action.

Section 193, Rem. Code, provides:

“No action shall abate by the death, marriage, or other disability of the party, or by the transfer of any interest therein, if the cause of action survive or continue; but the court may at any time, within one year thereafter, on motion, allow the action to be continued by or against his representatives or successors in interest.”

In *Schroeder v. Pratt*, 21 Utah 176, 60 Pac. 512, the supreme court of Utah, considering a similar statute, said:

“A motion to dismiss the appeal is made on the grounds that the judgment herein was assigned in writing to P. J. Daly and Frank B. Stephens, and that the assignment was filed in the office of the clerk of the court below prior to the service of the notice of appeal on the respondent, A. T. Schroeder, and that no notice of appeal was served on the assignees of said judgment. Such an assignment, under the provisions of section 2920 of the Revised Statutes, does not abate the action, but the same may be carried on in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action. It does not appear that the appellants had actual notice of the assignment and no substitution of parties has been made. Until the assignees are substituted as parties in place of A. T. Schroeder, he is the person upon whom notice in the case should be served. The motion to dismiss is overruled.”

It necessarily follows that, if it was not essential to serve notice of appeal upon the assignee, it was not necessary that he be named in the bond. Until an order of substitution has been made, the respondent continues to be the "adverse party" within the contemplation of Rem. Code, § 1721, designating the person to whom the bond on appeal shall be executed.

Furthermore, the rights of the assignee are in no-wise affected by the failure of the undertaking to name such assignee as the obligee therein, the authorities holding that the assignment of a judgment by the judgment creditor carries with it to the assignee the right to sue upon the bond running to his assignor, even though the assignment is made and filed before the bond is executed. *May v. Kellar*, 1 Mo. App. 381; *Bennett v. McGrade*, 15 Minn. 132; *Ullmann v. Kline*, 87 Ill. 268; *Knight v. Griffey*, 161 Ill. 85, 43 N. E. 727; *Wehle v. Spellman*, 75 N. Y. 585; *Stewart v. Miles*, 105 Mo. App. 242, 79 S. W. 988; *Crum v. Stanley*, 55 Neb. 351, 75 N. W. 851.

In *May v. Kellar*, *supra*, Bakewell, J., delivering the opinion of the court on motion for rehearing, said:

"Though the judgment was assigned by May to Lackland & Broadhead before the appeal bond was given, we are of opinion that the bond was properly executed to May as the adverse party in the suit, within the meaning of the statute. . . . When the judgment was assigned to Lackland & Broadhead, there passed to them all remedies provided by law for the enforcement of that judgment, including recourse upon the appeal bond."

In *Bennett v. McGrade*, *supra*, the supreme court of Minnesota said:

"After the commencement of the original action against McGrade, Williams, the plaintiff therein, assigned the property and claim for the recovery of which the action was brought, to Bennett. Bennett

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therefore became the real owner, and although the proceedings were continued in the name of Williams, they were for Bennett's interest; the bond for the appeal, being one of the subsequent proceedings, although taken in the name of Williams, was for the use of Bennett."

The motion to dismiss the appeal is denied.

ELLIS, C. J., FULLERTON, MAIN, and PARKER, JJ., concur.

[No. 14228. Department One. April 22, 1918.]

DONALD McRAE, *Appellant*, v. ANGELES BREWING
COMPANY *et al.*, *Respondents*.¹

INDEMNITY—REPLEVIN BOND—LIABILITY OVER—PERSONS NOT PARTIES OR LIABLE BY OPERATION OF LAW. Where a sheriff wrongfully replevied property in a suit by a receiver, and under judgment on the replevin bond, there was no return of the property, which was assigned by the receiver, and the receiver's bondsman was held liable and recovered judgment against the sheriff, the sheriff cannot recover over from the receiver's assignee, to whom the replevied property had been delivered by the sheriff upon demand, such assignee, not having been a party to the former action; inasmuch as such assignee was not liable by express contract or by operation of law by reason of the fact that the sheriff had turned the property over, as his duty required; the receiver having presumably obtained value for the property when assigned, and there being no showing that assets in his hands were insufficient to pay the claim.

Appeal from a judgment of the superior court for King county, French, J., entered February 6, 1917, upon sustaining a demurrer to the complaint, dismissing an action to recover the amount of a judgment against a sheriff through the levy of a writ of replevin. Affirmed.

Hathaway, Beebe & Hathaway, for appellant.

Frank A. Steele and Edgar C. Snyder, for respondents.

¹Reported in 172 Pac. 263.

MAIN, J.—The plaintiff brought this action for the purpose of recovering the amount of a judgment and costs which had previously been rendered against him as sheriff of Snohomish county, which judgment, it is claimed, resulted from the levy of a writ of replevin upon certain personal property. When the cause came on for trial, the defendants demurred *ore tenus* to the complaint, and objected to the introduction of any evidence in support thereof because no cause of action was stated. After argument, the position of the defendants was sustained. The plaintiff thereupon declined to plead further and elected to stand upon the complaint, and a judgment was entered dismissing the action. From this judgment, the plaintiff appeals.

The controlling facts in the complaint may be stated as follows: The Angeles Brewing & Malting Company was a corporation organized and existing under the laws of this state. On April 18, 1910, this company being financially embarrassed, one J. F. Janecke was appointed a receiver therefor. The surety on the receiver's official bond was the Fidelity & Deposit Company of Maryland. On the 26th day of March, 1913, the receiver commenced an action in the superior court of Snohomish county for the recovery of certain personal property which he claimed belonged to the Angeles Brewing & Malting Company. The defendants in this action were A. E. Kick and wife. When the action was instituted, the receiver gave a bond in replevin upon which the National Surety Company was surety. When the bond was filed, a writ of replevin was issued and delivered to the appellant, as sheriff of Snohomish county, and he immediately took possession of the property in dispute in the action. While the replevin action was pending, the receiver for the Angeles Brewing & Malting Company sold and transferred the assets of that company to the Angeles Brewing Com-

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pany, a corporation. A part of the property covered by this transfer was that in dispute in the replevin action. On June 30, 1913, E. C. Snyder, acting as the agent or attorney for the Angeles Brewing Company, requested the appellant to turn over to the latter company the property which he held under the writ of replevin. This was done. Subsequently the replevin action went to trial and resulted in a finding that Kick and wife were the owners of the property in dispute in the replevin action, and the judgment ordered the return thereof to them, and that, in the event of failure to return the property, judgment be entered for \$250 and the costs against the plaintiff in that action. The property was not returned, and the judgment was so entered. This judgment not being paid by the receiver, who was the plaintiff in the action, a judgment was obtained against the National Surety Company, the surety on the replevin bond, for \$297.92, which judgment was paid by the surety company. On the 26th day of August, 1914, the National Surety Company filed a claim for the amount of this judgment and the costs which it had sustained, with the receiver for the Angeles Brewing & Malting Company. This claim was subsequently allowed by the receiver. Thereafter the Fidelity & Deposit Company, the surety on the receiver's official bond, paid to the National Surety Company, the surety on the replevin bond, the amount of the claim and took an assignment thereof. On the 8th day of January, 1916, the Fidelity & Deposit Company of Maryland instituted an action against the appellant to recover the amount paid by it to the National Surety Company, and recovered a judgment against the appellant and the United States Fidelity & Guaranty Company, the surety on his official bond as sheriff. After this action had been begun, notice thereof was given to both of the respondents, coupled with the de-

mand that they defend the action. This they did not do. Subsequently and on the 8th day of May, 1916, judgment was rendered against the appellant and the surety on his bond in the sum of \$441.82. The present action was begun to recover from the respondents the amount of this judgment.

The theory of the complaint, if we have correctly interpreted it, is that the property in dispute in the replevin action was wrongfully and fraudulently obtained by the Angeles Brewing Company while that action was pending. As we view it, however, the representations at the time the property was delivered to the Angeles Brewing Company are immaterial. At that time the appellant held the property under a writ of replevin and no redelivery was either theretofore or thereafter given. Consequently it became his duty upon the expiration of three days and the payment of his costs, to turn the property over to the plaintiff in the replevin action, the receiver for the Angeles Brewing & Malting Company. But the receiver had, prior to this time, sold and transferred the property to the Angeles Brewing Company. Therefore, when the property was turned over to the latter company, it passed to the grantee of the plaintiff in the replevin action. No redelivery bond having been given, the bond in replevin stood for the property. The respondents here were not parties to the action against appellant which resulted in the judgment which is the basis of the present action. Not being parties to that action, the notice to them of the pendency of the action and the demand that they defend the same would not obligate them to pay the judgment, unless they were liable over either by express contract or by operation of law. *National Surety Co. v. Fry Co.*, 86 Wash. 118, 149 Pac. 637. Obviously, they were not liable by express contract, and it seems equally clear that a liability could not arise

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by operation of law by reason of the fact that the sheriff, at the request of the agent or attorney for the Angeles Brewing Company, did an act which it was his duty to do. There being no liability on the part of the respondents, either by express contract or by operation of law, they were not required, in response to the notice and demand, to appear and defend the action.

While the question is not before us, it may not be inappropriate to say that we do not understand upon what theory the judgment was rendered against the appellant, as sheriff, and his bondsman in the action brought by the Fidelity & Deposit Company of Maryland. The property of the Angeles Brewing & Malting Company had been sold by the receiver and, presumably at least, he had received compensation therefor which became a part of the funds in his hands.

The claim of the National Surety Company, the surety on the replevin bond, was filed with the receiver and allowed. There is no showing that the assets in the receiver's hands were not sufficient to pay this claim. The Fidelity & Deposit Company of Maryland, the surety on the receiver's official bond, was therefore a mere volunteer when it paid the amount of the claim of the National Surety Company, the surety on the replevin bond. But it is unnecessary to pursue this question because no appeal has been prosecuted from that judgment.

The judgment will be affirmed.

ELLIS, C. J., FULLERTON, PARKER, and WEBSTER, JJ.,
concur.

[No. 14272. Department One. April 22, 1918.]

UNION SAVINGS & TRUST COMPANY OF SEATTLE,
Appellant, v. WALTER MANNEY *et al.*,
Respondents.¹

FRAUDULENT CONVEYANCES—TRANSACTION BETWEEN HUSBAND AND WIFE—PAROL GIFT—EVIDENCE—SUFFICIENCY. In an action to set aside a deed from husband to wife, as fraudulent as to community creditors existing at the time of the conveyance, the evidence is insufficient to show that the property was the separate property of the wife, where the transaction can only be sustained as a ratification of a prior parol gift of the husband's community interest in real estate, taken in the wife's name after coverture and presumptively community property, and upon the faith of which credit was given by existing creditors in the belief that it was community property.

SAME. In such action, where the spouses had nothing at the time of marriage, it was incumbent upon the wife to show that the property was acquired by gift; and an oral gift of real estate, void under Rem. Code, § 8745, requiring the same to be by deed, cannot be shown by the fact that real estate, acquired after coverture, was taken in the wife's name, when less than one-tenth of the purchase price was traced to the wife's separate personal property; since the same was presumptively community property, and its status when acquired remains the same until divested by deed or estoppel; and since if the attempted gift by parol was void, any subsequent attempted ratification by deed would also be void as to creditors then existing.

Appeal from a judgment of the superior court for King county, Jurey, J., entered December 4, 1916, in favor of the defendants, in an action to set aside a deed and subject property to the lien of a judgment, tried to the court. Reversed.

McClure & McClure (Walter S. Osborn, of counsel), for appellant.

J. B. Murphy and *H. E. Peck*, for respondents.

ELLIS, C. J.—In this action plaintiff, a judgment creditor of defendants as a marital community, seeks

¹Reported in 172 Pac. 251.

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to set aside a deed from defendant husband to defendant wife conveying block 1, and lots 4 to 9, both inclusive, in block 2, of Manney's addition to the city of Seattle, and to subject that property to the lien of the judgment.

The facts are these: Defendants were married in 1883. They came to Seattle some twenty-seven years ago, at which time, the wife testified, "We had just barely enough money to bring us here." In the fall of 1904, the partnership of W. F. Manney & Company was formed, consisting of defendant Walter Manney and his two sons, W. F. Manney and Henry Manney. The firm was engaged in the business of street and highway contracting until the fall of 1914, when it became insolvent through heavy losses on three contracts. Frequent loans were secured from the plaintiff bank, and it appears that, from February 20, 1907, up to the commencement of this action, the firm was only twice free from debt to plaintiff, once from September 10 to October 9, in 1908, and again from August 5 to August 7, in 1912. Though the fact is disputed, we think the evidence fairly establishes that, at the time of the failure, defendant Walter Manney had overdrawn his account with the partnership to the extent of at least \$7,000.

On June 28, 1915, plaintiff recovered a judgment for \$4,770 and attorney's fees against Walter, W. F. and Henry Manney and against the three communities composed of these men and their wives. This judgment was based upon three notes of the partners for loans from plaintiff for \$1,500, \$1,200 and \$2,000, respectively, and respectively dated August 17, 1914, August 24, 1914, and October 5, 1914. Upon this judgment an execution was issued and returned unsatisfied. On April 13, 1915, while the action on the notes was pending, Walter Manney executed to his wife a deed of the

property here involved on an expressed consideration of love and affection, with a recital that the deed was given "in confirmation of my act of giving to my said wife all my community interest, if any, in the above described real property at the time said land was purchased and the instrument of conveyance taken in the name of Amelia Manney," and further reciting that it was their intention, at the time of such purchase, that the land should be and remain her separate property, for which purpose the deed was taken in her name and payment was made from sale of property owned by her.

Defendants' version of the acquisition of this property is as follows: In the spring of 1901, they purchased twelve lots in Gilman Park addition to Seattle for a consideration of \$960, paying \$500 cash and giving a \$460 purchase money mortgage. It was then agreed between them that the property was to be the wife's separate property as a gift from the husband. The initial \$500 was raised, \$95 from the sale of two cows which the wife testified had been given her by the husband, who added \$65, and they borrowed \$340 from W. F. Manney, who was to receive half of the profits in case of sale. Title was taken in the wife's name, and both defendants executed a mortgage upon the lots for the balance of \$460 to one Polhemus, the seller. The husband was not willing to build a home on these lots, and in the fall of 1901 and summer of 1902, they were sold for about \$2,100. The money was collected, put in his own bank account and disbursed by defendant Walter Manney. He paid the mortgage and gave one-half the profits to W. F. Manney. The money was mingled with his other funds, which were checked against indiscriminately for these and his general business purposes. Both defendants testified that, when these lots were sold, it was with the understanding that

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other property more suitable for a home would be purchased and given to the wife in her name for her "separate support against any loss he might sustain in business." Accordingly they looked at lots 3, 4, 5, 6 and 7 of Leary Acre Tracts, and on October 26, 1901, Walter Manney entered into a contract with Ferry-Leary Land Company for their purchase. This contract recited that the vendor will sell to W. Manney the tracts mentioned for a consideration of \$800, of which \$100 was to be paid in cash and \$700, with interest, in deferred installments. On this contract seven payments were made as follows: October 26, 1901, initial payment \$100; January 29, 1902, \$100; May 12, 1902, \$120; August 30, 1902, \$200; April 13, 1903, \$180; November 24, 1905, \$100; April 17, 1907, \$74.50; total, \$874.50.

Touching these payments the husband testified that the first was made from proceeds of sale of the Gilman Park lots, that he did not know where he got the money with which he made the second, third and fourth payments, and that he made the fifth from money paid to him for a homestead relinquishment. The last two payments were made by Mrs. Manney with checks drawn on the funds of W. F. Manney & Company, signed by her husband or W. F. Manney. These payments matured the contract, and defendant Amelia Manney took the contract to the land company and, at her request, the deed was made in her name. Tract 6 was later sold and the other tracts were replatted as Manney's addition, both of defendants joining in the dedication as owners and both joining in the acknowledgment. The husband improved the property and constructed a house on lot 5, block 1, and has paid all taxes assessed against the lots since the purchase. W. F. Manney identified checks of the partnership aggregating over \$7,000, which checks he testified were given for labor and material which went into the con-

struction of the house and for taxes and disbursements in connection with the property. Mrs. Manney estimated that the house cost only about \$3,000, but whatever its cost, there is no question that it was paid for by her husband with community funds drawn from the partnership business. He testified that the money he paid for the lots, excepting the first \$100 and the money he afterwards expended for improvements and taxes, he considered as gifts to his wife, but it is not pretended that he ever actually gave her any of this money in specie. Over plaintiff's objection, several witnesses were permitted to testify that, at various times, the husband had stated that the Gilman Park lots, and subsequently the lots here involved, belonged to his wife. W. F. Manney, son of the husband and step-son of the wife, though he had lived with defendants till 1909, testified that he never heard of any such arrangement between defendants, that he assumed the property was community property, and in September, 1911, listed this property as an asset in the sum of \$20,000, in a statement to the bank.

In June, 1908, defendants joined in the execution of a mortgage to one Siegley on lot 4 of the Leary Tracts for a loan of \$1,500. This money was turned into the firm and credited to Walter Manney's account. When lot 6 of the Leary Tracts was sold to one Joslin the cash payment was treated in the same way. Afterwards the partnership purchased this tract from Joslin and took up a mortgage which he had given thereon to Amelia Manney as a part of the purchase price. This \$1,200 was credited by the firm to the account of Walter Manney. None of this money was turned over to Amelia Manney as owner of the property from which it was derived, nor was there any evidence tending to trace this specific money into the improvements on the property. It was evidently treated by all parties as

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community property of defendants and was placed and remained in the husband's control. On April 5, 1915, Amelia Manney filed a declaration of homestead on lot 5, in block 1, of Manney's addition. This is the lot on which the house stands and is more than double the size of the other lots.

Without making findings of fact or conclusions of law, these being waived, the court decreed that the real estate in question was the separate property of Amelia Manney, and awarded costs to defendants. Plaintiff appeals.

Was the property here involved the separate property of Amelia Manney? This is the sole question presented for our determination. Property acquired by either spouse during the coverture, otherwise than by gift, bequest, devise or descent, is presumptively community property. Rem. Code, § 5917. This property was not acquired by Amelia Manney through devise or descent. It was acquired during the coverture. It was, therefore, incumbent upon her to show by competent evidence that she acquired it by gift. The statute provides that one spouse may give, grant, sell or convey directly to the other, subject to any existing equity in favor of creditors of the grantor, his or her community right in any or all of their community realty, and that a deed made from one spouse to the other of such property shall operate to vest the title in the grantee as separate property. The grantor shall sign, seal, execute and acknowledge as a single person, without joinder therein of the grantee. Rem. Code, § 8766. Another section provides that all conveyances of real estate or of any interest therein shall be by deed. Rem. Code, § 8745. This is the only method provided by statute for the voluntary vesting of the title of community real property in either spouse as his or her separate

property during the coverture. The statute saves the rights of existing creditors.

The deed from Walter to Amelia Manney of April 13, 1915, was made at a time when the appellant was an existing creditor of the community. It requires, therefore, no argument to show that it was void as to the appellant, unless it can be sustained as a ratification by the husband of a prior parol gift of his community interest in the real estate to the wife. But the status of this property as community or separate property became fixed at the time it was purchased. *Katterhagen v. Meister*, 75 Wash. 112, 134 Pac. 673. If it then became vested in the community as community property it must so remain unless divested by deed, due process of law, or the working of an estoppel. *In re Deschamps' Estate*, 77 Wash. 514, 137 Pac. 1009.

It is not claimed that the property here involved ever lost its community character by operation of law, nor can it be claimed that such an effect has been produced through the operation of any estoppel as against appellant as a creditor. The evidence is, we think, conclusive that the appellant had no knowledge or notice, till shortly before the commencement of this action, of any claim that this property was the wife's separate property. It fairly appears that appellant extended credit and made the loans here involved to the firm of Manney & Company in the belief that this property was community property. If, therefore, the property was community property when acquired by the Manneys, it so remains, unless a parol gift of the community interest in real estate from a husband to wife be held valid in law. If the gift was not valid when made, the attempted ratification by the deed of April 13, 1915, was nugatory so far as appellant is concerned. An oral gift of community real estate from one spouse to the other

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is void. As said in *Graves v. Graves*, 48 Wash. 664, 94 Pac. 481:

"It was not claimed by the respondent that there was any written agreement, or that any of their property was passed by deed from one to the other, and it is conceded that the property in dispute was acquired and improved by community funds earned after marriage. The statute makes such property community property. Bal. Code, § 4490. An oral agreement that such property might be held as separate property by one of the spouses would be in the face of this statute and also another statute which provides that all conveyances of real estate or any interest therein shall be by deed. Bal. Code, § 4517."

See, also, *Abbott v. Wetherby*, 6 Wash. 507, 33 Pac. 1070, 36 Am. St. 176; *Churchill v. Stephenson*, 14 Wash. 620, 45 Pac. 28; *Woodland Lum. Co. v. Link*, 16 Wash. 72, 47 Pac. 222; *Katterhagen v. Meister*, *supra*.

Respondents are thus finally driven to the contention that this property was purchased by the wife with her separate funds, the proceeds of the sale of the Gilman Park lots, which lots, it is urged, were purchased with her separate funds given her by the husband. This genesis of her title, as we view it, halts at each step. It is undoubtedly the law that a gift from one spouse to the other of money or other personal property may be proved by parol declaration of the donor if accompanied by delivery to the donee with a complete relinquishment of dominion by the donor. But the evidence in this case falls far short of establishing anything of that kind, save in the instance of the two cows. The husband never at any time gave the wife any money, nor ever expressed to any one an intention to give her any money as such. His sole expressed intention was to buy the land and to give her the land. But he did not give her the land in the only way permitted by law for gifts *inter vivos* of real estate from husband to wife, namely, by his deed to her. True, he permitted the title

to be taken from third persons in her name. But that presumptively vested the title in the community. *Woodland Lum. Co. v. Link*, 16 Wash. 72, 47 Pac. 222; *Carpenter v. Brackett*, 57 Wash. 460, 107 Pac. 359. All of the money which went into the Gilman Park lots, save \$95, was community property. The husband contributed \$65. Of the balance, the sum of \$340 was raised by a loan from W. F. Manney and \$460 by a mortgage to Polhemus. These debts were community debts. The proceeds of these loans were community funds. *Katterhagen v. Meister*, *supra*.

The case of *Graves v. Columbia Underwriters*, 93 Wash. 196, 160 Pac. 436, is not controlling. There the loan was secured by the wife's separate property, admittedly such. Assuming, therefore, that the \$95 was a sufficient proportion of the purchase price to impress the property *pro tanto* with the character of separate property of the wife, and that we apply the rule of *Heintz v. Brown*, 46 Wash. 387, 90 Pac. 211, 123 Am. St. 937, rather than the rule of *Worthington v. Crapser*, 63 Wash. 380, 115 Pac. 849, still her separate interest in the Gilman Park lots was less than an undivided one-tenth. Had it been shown that all of the purchase price of the Leary tracts came from the proceeds of the sale of the Gilman Park lots she could have claimed, as her separate property, no more than an undivided one-tenth interest in the Leary Tracts. But this was not shown. On the contrary, only \$100 of the proceeds of the Gilman Park lots were ever traced into the Leary tracts. Demonstrably less than one-tenth of this \$100 was, in any view of the evidence, her separate property, an amount so small as clearly to invoke the rule *de minimus* as applied in the *Worthington* case and followed in *In re Deschamps*, *supra*.

The evidence in this case, taken at its face and construing it most strongly in favor of respondents, tend-

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ed to establish nothing more than an unexecuted intention on the husband's part to give this land to his wife. The belated attempt to carry out that intention by the deed of April 13, 1915, after appellant had become a *bona fide* creditor without notice of any such antecedent intention, must be held futile. To permit such a latent intention to prevail as against every outward appearance and against the plain terms of the statute would be to open the door to fraud in every case, make titles to real estate rest in parol, and strike a vital blow to all business credit.

The judgment is reversed, and the cause is remanded with direction to enter judgment for plaintiff, saving to Amelia Manney her claim of homestead exemption.

MAIN, PARKER, WEBSTER, and FULLERTON, JJ., concur.

[No. 14401. Department One. April 22, 1918.]

HENRY MOLLER *et al.*, Appellants, v. M. A. GRAHAM
et al., Respondents.¹

TAXATION—FORECLOSURE OF LIEN—SUMMONS—DESCRIPTION OF PROPERTY—SUFFICIENCY. Under Rem. Code, § 9257, requiring summons by publication in a general county tax foreclosure to describe the property the same as described on the tax rolls, a tax foreclosure and tax sale and deed thereunder is void, where the property was described in the summons as lots in "Bowman's plat," and on the tax rolls as lots in "Bowman's Central Ship Harbor Water Front Plat."

SAME—FORECLOSURE—JUDGMENT—CONCLUSIVENESS. Rem. Code, § 9267, providing that judgment for deed to real estate sold for taxes shall estop all parties from raising any objection thereto that could have been presented as a defense, has no application to a judgment which was void for want of proper summons giving jurisdiction.

Appeal from a judgment of the superior court for Skagit county, Brawley, J., entered July 30, 1917, upon

¹Reported in 172 Pac. 226.

sustaining demurrers to the complaint, dismissing an action to set aside deeds and to quiet title, tried to the court. Reversed.

Joiner & English, for appellants.

Norvell & Norvell, for respondent Graham.

Ben Driftmier, for respondent Skagit County Mortgage & Investment Company.

WEBSTER, J.—This action was brought by appellants to set aside a certain tax deed executed by the county treasurer of Skagit county, Washington, to respondent Graham, and a certain deed thereafter executed by Graham to respondent Skagit County Mortgage and Investment Company for, and to quiet the title of appellants in and to, the W½ of lot 6, and the E. 27 feet of lot 7, block 30, Bowman's Central Ship Harbor Water Front Plat of the city of Anacortes, Washington.

Appellants allege ownership of the premises by virtue of conveyance from Sarah Louise Dobbins and Richard Dobbins, her husband, who were the owners of the lands at the time of the assessment and subsequent tax foreclosure proceedings hereinafter referred to; appellant Henry Moller, having been the holder of a mortgage thereon during the pendency of such foreclosure proceedings and prior to his obtaining the deed from the Dobbins.

It was further alleged in the complaint that, in the year 1916, Skagit county brought an action in the superior court for the purpose of foreclosing a tax lien levied for the year 1910 upon the premises, and in such action a summons was served by publication in one general notice with other real estate; that, in the published summons, the property in question was not described as it was described upon the tax rolls of Skagit

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county, but the published notice contained the description as "the $W\frac{1}{2}$, Lot 6, Block 30, Bowman's Plat, Anacortes; E. 27 ft. Lot 7, Block 30, Bowman's Plat, Anacortes;" whereas the property was described on the tax rolls for the year 1910 as "the $W\frac{1}{2}$ of Lot 6, Block 30, Bowman's Central Ship Harbor Water Front Plat of the city of Anacortes, Washington, and the E. 27 feet of Lot 7, Block 30, Bowman's Central Ship Harbor Water Front Plat of the city of Anacortes, Washington," the description upon the tax rolls being the correct description of the property; that no further or other summons was issued, served or published in the tax foreclosure proceeding, and thereafter a decree of foreclosure, based thereon, was made and entered therein; that, subsequent to the entry of such decree, the county treasurer of Skagit county sold the premises to respondent Graham for the amount of the taxes for the year 1910 and subsequent years, including interest and penalties, amounting in all to the sum of \$204.92, and that, on October 28, 1916, pursuant to such foreclosure decree and sale, and in consideration of the sum mentioned, the county treasurer executed and delivered to respondent Graham a deed for the premises; that Graham thereafter attempted to convey the same by deed to respondent Skagit County Mortgage and Investment Company, which corporation now claims to be the owner thereof.

The complaint attacks the tax foreclosure proceedings upon three grounds: first, that the summons was void because the property was not described in the summons as it was described on the tax rolls; second, that the treasurer of Skagit county failed and neglected to notify the record owner of the real estate of the pendency of the foreclosure sale; third, that the real estate was not assessed in the name of the true owner for the year 1910.

It was further alleged that neither the plaintiffs nor their grantors had any notice or knowledge of the pendency of the tax foreclosure proceedings, and that, prior to the commencement of this action, the plaintiffs had tendered to defendant Skagit County Mortgage and Investment Company the sum of \$213.25, being the amount of the taxes, penalties, interest and costs paid by defendant Graham at the tax sale of the premises, together with interest thereon to date of tender, which amount was refused by the defendant company, and thereafter by the plaintiffs paid into the registry of the court for said defendant.

Relief was sought by decree setting aside the tax foreclosure proceedings and the conveyances to the defendants based thereon, together with the quieting of title to the premises in the plaintiffs. Demurrers to the complaint were sustained, and the plaintiffs refusing to plead further, the action was dismissed, from which judgment the plaintiffs have appealed.

As we view the case, the complaint states a cause of action for relief from the tax foreclosure proceedings upon the ground that the summons issued and published therein was void, the description of the property contained in the summons being fatally defective. It will not be necessary, therefore, to consider the other questions presented.

The requirements of the statute with reference to the contents of the summons in tax foreclosures by municipalities, in this respect, are:

“Provided that summons may be served or notice given exclusively by publication in one general notice, describing the property *as the same is described on the tax-rolls.*” Rem. Code, § 9257.

In the case of *Welch v. Beacon Place Co.*, 48 Wash. 449, 93 Pac. 923, this court had before it a similar state of facts where the property involved; which had been

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owned by Patrick Welch, consisted of lot 5, in block 7, of Syndicate addition to the city of Seattle, King county, Washington. In a tax foreclosure proceeding thereafter instituted by King county, this property was included with other property in the summons or notice published pursuant to the provisions of this section of the statute. On a page of the notice following a description of a large amount of property under the heading "Seattle Old Limits" was the following description of the property in question: "Syndicate Add.—P. Welch, lot 5 block 7." While the description of the property as it appeared on the tax rolls does not appear from the opinion in that case, these observations made by the court are pertinent to the facts in this case:

"A tax foreclosure proceeding of this character is in the nature of a proceeding *in rem*, and under the rule governing such, the property sought to be affected must be described with reasonable accuracy. The owners of this property appear to have paid their taxes regularly for many years. Why the matter was overlooked with reference to the taxes for which this foreclosure was brought, we do not know. Doubtless it was a mistake or oversight of some character. The owners were living in the state during all of that time. To take respondents' property from them in payment of these old and evidently overlooked taxes would be a hardship which should not be visited upon them, unless the jurisdictional requirements in the foreclosure proceeding were shown to have been fully complied with. The description of a single lot among a vast number of descriptions might easily escape an owner's notice, even if correct. If incorrect, the more easily could it be overlooked, even if the owner's attention was called to the list without suspecting that he had property mentioned therein. It is evident that the description under which this property was proceeded against was not the correct description of the property sought to be subjected to the tax lien, and we cannot say that this defect, con-

sidered together with the obscure place and form in which it appeared in the notice, was not sufficient to, or may not have misled the respondents or him under whom they claim, and cannot say that it was published in a form and possessed the accuracy and definiteness which can be said, as a matter of law, to have been sufficient to bind them with notice."

And in the case of *Miller v. Henderson*, 50 Wash. 200, 96 Pac. 1052, where the provisions of the statute requiring the certificate of delinquency to be filed with the clerk prior to the commencement of the foreclosure proceeding were held not jurisdictional, we said:

"The appellants argue that as the proceedings for the foreclosure of tax liens are special and statutory, and not according to the course of the common law, they must be construed strictly, and hence any failure on the part of the tax collectors to take the steps provided by the statute in the order in which they are therein provided must result fatally to any proceeding where the final result is to deprive a citizen of his property. Unquestionably this is in accord with the great weight of judicial authority; in fact, so uniform and so strict has been the application of the rule in most jurisdictions that the very term 'tax title' has become a synonym for worthlessness. But this court has not followed this rule in all of its strictness. It has seemed to us that the levy and collection of taxes is not a special proceeding in all of its aspects. Certainly the power to do so is something more than a mere statutory right. The power lies at the very foundation of government itself. It is a power that must be exercised in one form or another else the government will cease to exist for want of means to sustain itself. Hence, we have felt that statutory provisions relating to taxation were rather regulations upon the power than the source from which the power is derived; and being regulations, that they were to be regarded by the court as regulations are usually regarded when the proceedings had under them are attacked collaterally; that is to say, departures from the strict rule prescribed are to

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be regarded as fatal only where the departure affects some substantial right of the complaining party—where he is denied some substantial right which would have been granted him had the regulation been pursued according to its terms—but to deny relief where the departure complained of does not affect the complaining party either one way or the other. In the present case the delinquency thought to be fatal is of the latter sort. This omission to file the certificate of delinquency in the office of the county clerk prior to the issuance and service of the summons could in no manner affect the rights of the appellants. Nor was the thing itself in any way necessary to constitute due process of law, as the proceeding prescribed by the statute would have been as valid and obligatory without this requirement as with it. It being therefore neither essential to the rights of the landowners nor to the legality of the statute, we think the omission of the clerk to comply with it at the time contemplated by the framers of the act did not so far deprive the court of jurisdiction as to require us to hold the sale invalid.”

In *Wick v. Rea*, 54 Wash. 424, 103 Pac. 462, it is said:

“While the argument is forceful and is supported by respectable authority, this court is committed to the doctrine that a summons in tax foreclosure proceedings must comply with the statutes. Otherwise the court acts without jurisdiction. The rule, as stated in 17 Ency. Plead. & Prac., 45, ‘The right to serve process by publication being of purely statutory creation and in derogation of the common law, the statutes authorizing such service must be strictly pursued in order to confer jurisdiction upon the court,’ was adopted in *Thompson v. Robbins*, 32 Wash. 149, 72 Pac. 1043, and has been followed in the following cases: *Smith v. White*, 32 Wash. 414, 73 Pac. 480; *Dolan v. Jones*, 37 Wash. 176, 79 Pac. 640; *Woodham v. Anderson*, 32 Wash. 500, 73 Pac. 536; *Williams v. Pittock*, 35 Wash. 271, 77 Pac. 385; *Young v. Droz*, 38 Wash. 648, 80 Pac. 810; *Owen v. Owen*, 41 Wash. 642, 84 Pac. 606; *Bartels v. Christenson*, 46 Wash. 478, 90 Pac. 658; *Bauer v. Windholm*, 49 Wash. 310, 95 Pac. 277; *Gould v. Knox*,

53 Wash. 248, 101 Pac. 886; *Hays v. Peavy*, ante p. 78, 102 Pac. 889; *Gould v. Stanton*, ante p. 363, 103 Pac. 459; *Gould v. White*, ante p. 394, 103 Pac. 460."

The statute having required that the property shall be "described in the summons the same as described on the tax rolls," it necessarily follows that there must be at least a substantial compliance with such provision, since it is by virtue of the summons that the court acquires jurisdiction to hear and determine the cause. True, the proceeding is one *in rem*, yet it is essential that jurisdiction of the *res* be acquired in the method prescribed by the statute, otherwise the owner is deprived of his property without due process of law.

The difference in the two descriptions here in question is so marked that we are not prepared to say that they are substantially the same. To hold otherwise would open the door to other and further departures from the statute, even to the extent where the somewhat limited right guaranteed by the statute might not only be qualified, but eventually destroyed. Before the court is justified in saying that two descriptions are substantially the same, it should manifestly appear that they are so. Such rule imposes no hardship upon the tax collecting officers. They have in their possession the original entry of that which the statute says shall be inserted in the summons. To meet the requirement involves no unusual effort. The county treasurer need only refer to his records, the notice being sufficient if it follows the description embodied in the tax rolls. Nor does it work any injury to the purchaser at the tax sale, the party attacking the proceeding being required, as a condition precedent to the relief sought, to tender the purchaser the amount paid for the property at such sale, with interest to the date of the tender.

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The principal cases relied upon by respondents in support of the judgment of the lower court are *Konnerup v. Milspaugh*, 70 Wash. 415, 126 Pac. 939; *Ontario Land Co. v. Yordy*, 44 Wash. 239, 87 Pac. 257; *Continental Distributing Co. v. Smith*, 74 Wash. 10, 132 Pac. 631, and *Noble v. Aune*, 50 Wash. 73, 96 Pac. 688. A brief analysis of these cases is therefore pertinent.

The *Konnerup* case did not involve the question of the sufficiency of a description of property contained in a summons published in a tax foreclosure proceeding. The question there presented was the sufficiency of a description contained in a sheriff's deed made pursuant to execution sale, the court applying the rule that a description in an instrument affecting title to real estate is sufficient if it affords an intelligent means for identifying the property and is not misleading; also holding that extrinsic evidence in aid of the description was admissible for the purpose of identification.

In *Ontario Land Co. v. Yordy*, *supra*, the question presented was the sufficiency of the description appearing upon the assessment rolls, and not whether the property was described in the summons "the same as it was on the tax rolls;" moreover, no tender of the delinquent taxes, as required by the statute, had been made.

In *Noble v. Aune*, *supra*, it was insisted that the tax foreclosure proceeding was invalid for the reason that the name of the owner was given as "Henry Acenie" instead of "Henry Aune," as it appeared in the tax roll for some of the years for which the taxes were delinquent. The court refused to sustain this contention, holding that it is immaterial what name or names are used in the summons, or whether any are used, it being sufficient if the summons contains a proper description of the property.

In *Continental Distributing Co. v. Smith*, *supra*, it appears that the description of the property contained in the summons was identical with that contained on the tax rolls, the question raised being a discrepancy between the name of the owner as it appeared in the summons and on the tax rolls, and the insufficiency of the description appearing on the tax rolls. Without further discussion, it is apparent that the cases are not apposite.

Counsel for respondent cite and rely upon the following provisions of § 9267, Rem. Code:

“And any judgment for the deed to real estate sold for delinquent taxes rendered after the passage of this act, except as otherwise provided in this section, shall estop all parties from raising any objections thereto, or to a tax title based thereon, which existed at or before the rendition of such judgment, and could have been presented as a defense to the application for such judgment in the court wherein the same was rendered, and as to all such questions the judgment itself shall be conclusive evidence of its regularity and validity in all collateral proceedings, except in cases where the tax or assessments have been paid, or the real estate was not liable to the tax or assessment.”

This statute is not applicable here for the reason that the judgment was void, the court having never acquired jurisdiction of the tax foreclosure proceeding. The judgment is reversed, and the cause remanded with direction to overrule the demurrers to the complaint.

ELLIS, C. J., FULLERTON, MAIN, and PARKER, JJ., concur.

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[No. 14505. Department One. April 22, 1918.]

THE STATE OF WASHINGTON, *Respondent*, v.
J. D. WHEELER, *alias* J. M. WHEELER,
Appellant.¹

LARCENY—BY FALSE REPRESENTATIONS—INTENT—STATUTES. One who secures a loan by giving a chattel mortgage upon property that he did not own, is guilty of larceny, although he intended to make repayment, under Rem. Code, § 2601, making one guilty of larceny who, with intent to deprive the owner thereof, obtains possession of or title to any property by color or aid of any fraudulent or false representations.

Appeal from a judgment of the superior court for Yakima county, Holden, J., entered March 21, 1917, upon a trial and conviction of larceny. Affirmed.

Chas. F. Bolin, for appellant.

O. R. Schumann and *J. Lenox Ward*, for respondent.

MAIN, J.—The defendant was charged by information with the crime of larceny, committed by color or aid of fraudulent and false representations. The trial resulted in a verdict of guilty as charged. A motion for a new trial being made and overruled, the defendant appeals.

The facts may be briefly summarized as follows: On the 29th day of August, 1916, the appellant, together with his family, was residing on a ranch in Yakima county, and on this date the appellant obtained from E. C. Young, the agent of John W. Morken, a loan of \$75, and, as security therefor, gave a chattel mortgage on certain personal property. The personal property covered by the mortgage, with the exception of one cow, was not owned by the appellant, but was the property of the owner of the ranch upon which he then re-

¹Reported in 172 Pac. 225.

sided. Sometime thereafter the mortgagee or his agent, having learned that the property covered by the mortgage was not that of the appellant, caused his arrest, and after he had been formally charged with the crime of grand larceny, he was convicted as already stated.

The appellant's principal contention is that the evidence failed to show that the \$75 was obtained with criminal intent, and that therefore the trial court erred in not directing a verdict of acquittal. The statute (Rem. Code, § 2601) provides that—

“Every person who, with intent to deprive or defraud the owner thereof—

“(2) Shall obtain from the owner or another the possession of or title to any property, . . . by color or aid of any fraudulent or false representation, . . .

“Steals such property”

The appellant, if we understand his contention, claims that he intended to repay the money at some subsequent time, and that, therefore, it was not obtained with criminal intent. The money, however, was obtained from the agent of the owner by color or aid of fraudulent or false representations. The owner was deprived or defrauded thereof. The statute, as already indicated, makes one guilty of larceny who, with intent to deprive or defraud the owner thereof, shall obtain from such owner, or another, the possession of or title to any property by color or aid of any fraudulent or false representation. The evidence shows beyond controversy that the money was obtained by aid of fraudulent and false representations. Had it not been for the representations of the appellant that he was the owner of all the property covered by the chattel mortgage the loan would not have been made. It seems plain that the court did not err in submitting the

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question to the jury, and the evidence is ample to sustain the verdict.

There are some other assignments of error which relate to an instruction given and requests refused, and also as to certain evidence received. These assignments, however, are not argued in the appellant's brief, and while they have been considered, it seems unnecessary to review them here.

We find no error in the record, and the judgment will be affirmed.

ELLIS, C. J., PARKER, FULLERTON, and WEBSTER, JJ.,
concur.

[No. 14558. Department One. April 22, 1918.]

EDWARD J. WALSH, *Appellant*, v. ALASKA STEAMSHIP
COMPANY, *Respondent*.¹

MASTER AND SERVANT—EMPLOYERS' LIABILITY ACT—APPLICATION. The Federal employers' liability act of June 11, 1906 (34 Stat. 232), was not unconstitutional as to the territory of Alaska, and applies to injuries to employees of a common carrier occurring in Alaska, although the carrier was engaged in interstate commerce.

STATUTES — REPEAL BY IMPLICATION — TERRITORIES — EMPLOYERS' LIABILITY ACT—APPLICATION. The Federal employers' liability act of June 11, 1906 (34 Stat. 232), relating to all common carriers, including carriers by water, and held valid as to carriers engaged in trade or commerce in the District of Columbia and the territories, was not impliedly repealed by the Federal employers' liability act of April 22, 1908 (35 Stat. 65), relating to the liability of common carriers by railroad to their employees while engaged in interstate or foreign commerce; since the prior act embraces common carriers by water while unloading in Alaska, which are not within the scope or operation of the later act.

SAME—IMPLIED REPEAL—INTENT. The intent to repeal the former law by the later act is not shown by the fact that Congress promptly passed the later act upon the President's suggestion to reenact the former law in such a way as to make it constitutional; since Congress did not reenact such law in its entirety or legislate upon the entire subject-matter thereof.

¹Reported in 172 Pac. 269.

SAME—REPEALS BY IMPLICATION—SAVING CLAUSE—CONSTRUCTION. Section 8 of the employers' liability act of 1908 (35 Stat. 65), providing that nothing in the act shall limit the liability of carriers or affect the rights of employers under pending claims under the employers' liability act of June 11, 1906 (34 Stat. 232), does not show an intent to repeal the prior act in its entirety; since such a saving clause does not destroy any rights, and is not to be confused with a saving clause in a repealing section which destroys all things not saved.

MASTER AND SERVANT—EMPLOYERS' LIABILITY ACT—MARITIME LAW. The Federal employers' liability act of June 11, 1906 (34 Stat. 232), being a valid statute regulating the liability of common carriers other than by railroad, in the District of Columbia and the territories, modifies general prior acts of Congress and the general maritime law of the United States, in so far as it confers rights and creates liabilities in its limited field inconsistent with such general acts and laws.

Appeal from a judgment of the superior court for King county, Frater, J., entered August 13, 1917, upon granting a nonsuit, dismissing an action for personal injuries sustained by an employee engaged in unloading a vessel. Reversed.

Robert G. Cauthorn (Walter S. Fulton, of counsel),
for appellant.

Bogle, Graves, Merritt & Bogle, for respondent.

WEBSTER, J.—This action was brought by appellant to recover damages from respondent on account of injuries received by him while employed as a seaman on one of respondent's vessels engaged in commerce within the territory of Alaska and between ports thereof and the state of Washington. The accident which caused the injury complained of occurred while the appellant was assisting in unloading cargo at the port of Cordova, in the territory of Alaska. The complaint pleaded in full the act of Congress approved June 11, 1906, commonly known as the employers' liability act, and alleged facts sufficient to bring the case within the provisions of the act. Upon the trial of the cause,

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there was competent evidence tending to establish all of the material allegations of the complaint with this respect sufficient to require the submission of the cause to the jury, assuming that the act of Congress referred to was in force and effect in the territory of Alaska at the time the injury was received. The trial court, however, at the close of the plaintiff's case, sustained the defendant's motion for nonsuit, and thereafter entered judgment dismissing the action. The plaintiff has appealed.

As we view the case, the only remaining questions to be determined upon this appeal are whether the employers' liability act of June 11, 1906, became operative in the territory of Alaska; if so, have its provisions, as affecting the facts of this case, been repealed by the subsequent legislation of Congress upon the subject.

As to the first proposition, it is not contended that the act was unconstitutional in so far as it was made applicable to common carriers and their employees engaged in commerce in the territory of Alaska. This subject is foreclosed by the holdings of the supreme court of the United States to the effect that the act, though void in so far as it attempted to regulate commerce within the states, and common carriers and their employees engaged in such commerce, still remained a valid regulation of the subject as applied to the District of Columbia and the territories. This because of the plenary power vested in Congress to legislate for the territories and the dependencies, unrestricted by the limitations placed by the constitution upon its power to legislate for the states. *Employers' Liability Cases*, 207 U. S. 463; *El Paso & N. E. R. Co. v. Gutierrez*, 215 U. S. 87; *Philadelphia, B. & W. R. Co. v. Schu- bert*, 224 U. S. 603; *Butts v. Merchants' & Miners' Transp. Co.*, 230 U. S. 126; *Santa Fe Cent. R. Co. v.*

Friday, 232 U. S. 694; *Washington, A. & Mt. V. R. v. Downey*, 236 U. S. 190. To the same effect are the decisions of the court of appeals of the District of Columbia in *Hyde v. Southern R. Co.*, 31 App. Cas. (D. C.) 466, and the district court of the United States for the eastern district of Michigan in *The Pawnee*, 205 Fed. 333.

Respondent suggests that, even though the employers' liability act of June 11, 1906, was valid as to the District of Columbia and the territories, nevertheless it merely had the force of a local statute applicable solely to carriers while engaged in commerce within the District of Columbia and the territories. While it may be assumed that the act was local in its character as so applied, it does not follow that an employer against whom the provisions of the act are sought to be enforced may not be engaged in commerce other than commerce within the territory in which the injury was received. It is sufficient if the act was in force at the place where the cause of action accrued. *Washington, A. & Mt. V. R. v. Downey*; *Hyde v. Southern R. Co.*; *El Paso & N. E. R. Co. v. Gutierrez* and *The Pawnee*, *supra*.

It is insisted, however, that the act in question has no application to this case for the reason that it was repealed by the subsequent legislation of Congress upon the subject embodied in what is generally known as the employers' liability act, approved April 22, 1908, the appellant having sustained the injury complained of after the taking effect of the later statute. This contention is based, first, upon the assumption that the later statute treats of the same subject-matter, and being the last expression of the legislative will, necessarily repeals the former act by implication; furthermore, that it was the manifest intention of Congress in enacting this legislation, having in view the decision of

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the supreme court of the United States affecting the validity of the act of 1906, to treat of the whole subject-matter embraced in the former act, except in so far as it related to commerce within the states, and having so intended, that all provisions of the former act held to be in force in the territories are superseded by the later enactment; second, upon the assertion that the language of § 8 of the act of 1908, in saving to employees the right to prosecute "any pending proceedings or right of action" which had accrued under the act of 1906, works a repeal in its entirety of the former enactment, except as to pending proceedings and accrued causes of action which were saved by the express provisions of the later statute.

The employers' liability act of 1908 contains no words expressly repealing any provision of the former act approved June 11, 1906. If a repeal is wrought it is so because of the fact that the subsequent enactment repeals the former by implication. It is well settled that an implied repeal results from some enactment the terms and necessary operation of which cannot be harmonized with the terms and necessary effect of an earlier act. In such case, the later law prevails as the last expression of the legislative will, therefore, the former law is constructively repealed, since it cannot be supposed that the law-making power intends to enact or continue in force laws which are contradictions. Subsequent legislation repeals previous inconsistent legislation whether it expressly declares such repeal or not. In the nature of things it would be so, not only on the theory of intention, but because contradictions cannot stand together. Lewis' Sutherland, *Statutory Construction* (2d ed.), § 247. Hence, if the *terms* and *necessary operation* of the act of 1908 are so inconsistent with the *terms* and *necessary effect* of the act of 1906 that the two enactments cannot be har-

monized, then it may be said that the repeal operated in its entirety. On the other hand, if there were independent provisions of the former act in force and effect in the territories when the later statute was passed—legislation affecting a different class of employers or employees engaged in commerce therein—which are not embraced within the scope and *necessary operation* of the act of 1908, then, as to such employers and employees, the provisions of the former statute are not inconsistent or inharmonious with the more recent enactment; in which event the act of 1906, though limited in its operation to the class of employers and employees not included within the scope of the act of 1908, yet remains a valid and subsisting law for the territory of Alaska.

The act approved June 11, 1906, is entitled: "An Act relating to liability of common carriers in the District of Columbia and Territories and common carriers engaged in commerce between the states and between the states and foreign nations to their employees." 34 Stat. at L. 232, ch. 3073; U. S. Comp. St., 1901, Supp. 1907, p. 891. As to the scope and extent of this act, Mr. Justice White, in the *Employers' Liability Cases*, *supra*, said:

"From the first section it is certain that the act extends to every individual or corporation who may engage in interstate commerce as a common carrier. Its all-embracing words leave no room for any other conclusion. It may include, for example, steam railroads, telegraph lines, telephone lines, the express business, vessels of every kind, whether steam or sail, ferries, bridges, wagon lines, carriages, trolley lines, etc. Now, the rule which the statute establishes for the purpose of determining whether all the subjects to which it relates are to be controlled by its provisions is that any one who conducts such business be a 'common carrier engaged in trade or commerce in the District of Co-

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lumbia, or in any territory of the United States, or between the several States,' etc."

It is clear that this act embraced within its scope common carriers by water. Nor can it be seriously contended that it did not apply to *all* common carriers in the District of Columbia and the territories, irrespective of whether such common carriers were also engaged in commerce between the states, within the states, or between the states and the territories, or between the states or territories and foreign nations. Such is its plain import; such is the effect of the decision in the *Employers' Liability Cases*, *supra*. It was a regulation of the common carrier who engaged in the business, rather than a regulation of the business engaged in by such carrier.

We have seen that the constitutionality of the act was sustained in so far as it applied to the District of Columbia and the territories, the effect of which was to adjudge the statute a valid and subsisting law relating to *all* common carriers while within the territorial limits of the District of Columbia or any of the territories of the United States.

The second employers' liability act, approved April 22, 1908, is entitled: "An act relating to the liability of common carriers by railroad to their employees in certain cases." (35 Stat. at L., ch. 149, p. 65; U. S. Comp. St., 1901, Supp. 1909, p. 1171.) In comparing the scope of this act with that of the former statute, Mr. Justice McReynolds, for the court in *Southern Pac. Co. v. Jensen*, 244 U. S. 205, 212, said:

"The first Federal Employers' Liability act (June 11, 1906, C. 3073, 34 Stat. 232) extended in terms to all common carriers engaged in interstate or foreign commerce, and because it embraced subjects not within the constitutional authority of Congress was declared invalid. The Employers' Liability cases, 207 U. S. 463,

January 6, 1908. The later act is carefully limited and provides that 'every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states and territories, or between the District of Columbia or any of the states and territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce. . . . Evidently the purpose was to prescribe a rule applicable where the parties are engaging in something having direct and substantial connection with railroad operations, and not with another kind of carriage recognized as separate and distinct from transportation on land and no mere adjunct thereto.'

The district court of the United States for the eastern district of Michigan, in the case, *The Pawnee*, *supra*, referring to the scope of the later enactment, said:

"It is clear that the act of April 22, 1908, is limited to common carriers by railroad. Such are its express terms. Where a vessel is part of a railroad system, and its crew are employes of the railroad, it would seem as if this act might include maritime injuries. *The Passaic*, (D. C.) 190 Fed. 644, 649. But the *Pawnee* was not a part of a railroad or railroad system, nor a common carrier. She was not engaged in the carrying trade for the general public, nor held out to carry the goods of all persons indifferently who might apply. She carried only under special arrangement, for specific cargoes, with such parties as agreements might be made. She made no profession to carry for all, and was under no obligation to take whatever goods might be tendered. She ran on no particular schedule of time, nor between any particular places or termini. She selected such cargoes as she saw fit to carry and at such prices as might be agreed upon. She had the right to refuse any freight which she wished to reject. A ship in the business in which the *Pawnee*

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was engaged is not a common carrier in the legal sense of the term, but in fact and in law a private carrier only. . . . This conclusion would exclude her from the operation of the statute of 1906, if for any reason the provisions of that law could be otherwise held to be in force under the circumstances of this case, and no recovery can be had thereunder."

From these observations, as well as from a consideration of the subject-matter of the two acts in question, it is apparent that the scope of the prior enactment was far more comprehensive than, and included in its terms classes of carriers not embraced within or sought to be regulated by, the subsequent enactment. Much of the subject-matter dealt with in the former, though significantly omitted from the latter, was a lawful exercise of the powers vested in Congress by the constitution. Nor can it be gainsaid that Congress possessed the power, had it seen fit to exercise it, to extend the provisions of the act of 1908 to *all* classes of common carriers in the District of Columbia and the territories, and to all such carriers while engaging in commerce between the states, or between the states and foreign nations, or between the states and the District of Columbia or the territories, or between the District of Columbia or the territories and foreign nations; yet we are urged to hold that Congress, by expressly limiting the application of the later statute to common carriers *by railroad*, intended to repeal by implication the substantive provisions of its prior valid enactment, in so far as they applied to common carriers other than by railroad.

Moreover, it is insisted that we must so hold because of the circumstances which prefaced the enactment of the more recent legislation; that is to say, that, when the supreme court, in the *Employers' Liability Cases*, held the act of 1906 unconstitutional, the President

forthwith addressed Congress with this respect as follows:

“As regards the Employer’s Liability law, I advocate its immediate re-enactment, limiting its scope so that it shall apply only to the class of cases as to which the court says it can constitutionally apply, but strengthening its provisions within this scope.” (Cong. Record, 60th Congress, First Session, p. 1347.)

And that Congress having thereupon passed the act with unusual promptness, it must be assumed that, in so doing, the intention was to adopt the suggestion of the President by reenacting the statute of 1906, making it apply only to the class of cases “as to which the court says it can constitutionally apply.”

Assuming that Congress enacted the legislation because of the President’s suggestion, the fact yet remains that it *did not* reenact the former statute; neither did it make the act of 1908 apply to the class of cases which the supreme court, in the *Employers’ Liability Cases*, says it can constitutionally apply. On the contrary, it passed an act which only *professed* to apply to common carriers *by railroad*; whereas the act which it is said they intended to repeal *in its entirety* applied to *all* common carriers regardless of the character of the commerce in which such carriers were engaged or the means by which the business was carried on. If Congress had intended, by the later enactment, to adopt the views of the President and legislate upon the *entire* subject-matter embraced in the former act, so far as it had the power as defined in the *Employers’ Liability Cases*, the purpose could have been easily accomplished simply by making the act apply to *all* common carriers, with the limitation which was carefully written into the act, “*while engaging in commerce between,*” etc. It was this limitation that relieved the act of 1908 of the objectionable feature of

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attempted commerce regulation *within the states* which was fatal to the act of 1906, not the fact that the later enactment was restricted in its application to common carriers *by railroad*.

The further contention of respondent's counsel that the language of § 8 of the act of 1908 clearly shows the intention of Congress to repeal in its entirety the act of June 11, 1906, is without merit. The language of the section is:

"That nothing in this act shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other act or acts of Congress, or to affect the prosecution of any pending proceedings or right of action under the act of Congress entitled 'An act relating to liability of common carriers in the District of Columbia and territories, and to common carriers engaged in commerce between the states and foreign nations to their employees,' approved June eleventh nineteen hundred and six." 35 Stat. 66; U. S. Comp. St. 1901, Supp. 1909, p. 1173.

In support of their position, counsel for respondent say:

"It will be noted that this section expressly provides that the act of 1908 shall not be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other act or acts of Congress *or to affect* the prosecution of any *pending* claims arising under the act of 1906. By thus limiting the rights of employees to prosecute *pending* claims under the act of 1906, Congress has clearly indicated its intention of prohibiting the prosecution of any *future* claims under this act, and in effect has expressly repealed the act of 1906. The rights of employers under '*any other act* of Congress, such as the Safety Appliance act, are not in anywise affected.'

It seems to us that the argument of counsel for appellant in reply to this contention is so forceful and

convincing that we have presumed to adopt it as a sufficient answer to the theory advanced by respondent's counsel:

"This section is not a repealing section and contains no words of repeal. On the contrary, it expressly sets out that the act of 1908 shall not be given the construction respondent is trying to put upon it. Respondent ignores the first part of the section which is, 'That nothing in this act shall be held to limit the duty or liability of common carriers or impair the rights of their employees under any other act or acts of Congress.' Respondent bases its whole argument upon the latter part of the section which is, 'That nothing in this act shall be held . . . to affect the prosecution of any pending proceedings or right of action under the act of . . . 1906.' Because the section enumerates certain things that are not to be affected, respondent inferred that all things not enumerated were intended to be affected. This at most is only an inference, and laws are not repealed by inferences. But it is not the correct inference. Enumeration is made to save the enumerated things, not to destroy the things not enumerated. Only things in danger of destruction without enumeration are included in the things enumerated. . . . Respondent's error consists in confusing a saving clause in a saving or construction section, with a repealing section containing a saving clause. In both cases, the saving clause saves, it never destroys. But where there is an express repealing section, all things not enumerated in the saving clause are destroyed by the express provisions of the repealing portion of the section or by those parts of the later act which are in irreconcilable conflict with the earlier act. Hence, in such acts, the saving clause saves only what it embraces, and all not embraced are destroyed; but such destruction is wrought, not by not being included in the saving clause, but by virtue of the destructive force of the repealing portion of the act. The act of 1908 supplanted or repealed so much of the act of 1906 as pertained to common carriers by railroad. There was, therefore, danger of some court holding that the

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pending proceedings or rights of action against railroads, based on the act of 1906, and good in the territories and the District of Columbia, were destroyed by the repeal of that part of the act of 1906 upon which they were based. To save these cases against railroads, this saving clause was placed in the act. And that is all that clause does. It makes it certain that the pending cases and rights of action against railroads are not affected. But this saving clause of this railroad law, no more affected laws pertaining to ships (not a part of a railroad system) than it did laws relating to the tariff or the army."

When we pause to consider that repeals by implication are not favored, that it is the duty of courts to so construe, if possible, two acts in seeming conflict that both shall be operative, which duty is performed by permitting each to stand, where they confer different powers to be exercised for different purposes, or where the earlier enactment may perform some office or function not controlled by the latter, though both treat in a general way of the same subject-matter, we are constrained to hold that the employers' liability act of April 22, 1908, did not repeal the provisions of the act of June 11, 1906, in so far as the former applied to common carriers by water, and that the provisions of the earlier statute in that respect were in force and effect in the territory of Alaska on May 16, 1916, the date appellant sustained the injury upon which the right of action is based.

It is lastly contended by respondent's counsel that the act of 1906 does not apply to the facts of this case because of the provisions of the admiralty laws in force and effect at the time and place of the injury. The decisions of this court in *State ex rel Jarvis v. Daggett*, 87 Wash. 253, 151 Pac. 648, L. R. A. 1916A 446, and *Shaughnessy v. Northland Steamship Co.*, 94 Wash. 325, 162 Pac. 546, are cited in support of this

contention. We held in those cases that the provisions of the workmen's compensation laws of the state of Washington do not apply to employers and their employees engaged in maritime service upon the waters of Puget Sound. We are not concerned in this case with the conflict of national and state laws, nor with the construction or application of a state statute. The act of 1906 is a Federal, not a state statute; hence the authorities cited are not in point.

With reference to the doubt expressed by counsel for respondent as to the power of Congress, by the act of 1906, treated as a local statute, to abrogate or modify the general maritime law of the United States so as to confer upon employees of common carriers while in the territory of Alaska rights of action unknown to the admiralty or maritime law, it is sufficient to say that the act of June 11, 1906, though restricted in its operation by the decision in the *Employers' Liability Cases* to the District of Columbia and the territories, is, nevertheless, a valid statute regulating the liability of common carriers, *other than by railroad*, to their employees in such territory. If it confers rights and creates liabilities within the limited field of its operations which were not recognized by the admiralty or maritime laws, or the prior acts of Congress relating thereto, such general laws and prior acts are repealed or modified to the extent of the subject-matter lawfully embodied in this act.

Being of the opinion that the employers' liability act of June 11, 1906, applies to the facts of this case, the judgment is reversed, and the cause remanded for a new trial not inconsistent with the views herein expressed.

ELLIS, C. J., FULLERTON, MAIN, and PARKER, JJ.,
concur.

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[No. 14363. Department Two. April 23, 1918.]

EUGENE L. HOPKINS *et al.*, Respondents, v. JOHN L.
CRAIB *et al.*, Appellants.¹

PARTNERSHIP—ACTION FOR ACCOUNTING—PLEADING—VARIANCE. In an action by a partner for an accounting of the profits, it is not a fatal variance for the complaint to allege a partnership in the entire business while the proof showed an interest in only a part.

SAME—ACTION FOR ACCOUNTING—ALLOWANCE OF INTEREST. In an action by a partner for an accounting of the profits, interest should not be allowed a partner on capital invested, where interest on withdrawals of money from the partnership funds completely offset the interest that would otherwise be due.

REFERENCE—REPORT—EVIDENCE—TRANSCRIPTION. Upon a referee's report upon a partnership accounting, it is not error to refuse to require the shorthand notes to be transcribed, where the referee reported that it would cost a large sum of money, the evidence of the chief witnesses was found in the reports and schedules, and he fairly stated the evidence of other witnesses, and there was no showing that appellants offered to advance the money necessary to obtain the transcript; Rem. Code, § 375, requiring the referee to report all the evidence being mandatory only in cases where the means are provided by the complaining party.

APPEAL—REVIEW—PRESUMPTIONS—COSTS—WITNESS FEES. Where there is nothing in the record to show that witnesses before a referee did not report their attendance each day, it will be assumed on appeal that the witnesses who appeared and were examined were entitled to compensation as witnesses.

Appeal from a judgment of the superior court for King county, Ronald, J., entered March 24, 1917, in favor of the plaintiffs, confirming the report of a referee upon a partnership accounting, upon a hearing before the court upon exceptions thereto. Affirmed.

Byers & Byers, for appellants.

Morris & Shipley and *E. P. Dole*, for respondents.

MOUNT, J.—This action was brought to recover from the defendants one-half of the accrued profits in a part-

¹Reported in 172 Pac. 201.

nership business alleged to have existed between the plaintiff E. L. Hopkins and the defendant John L. Craib, from April 1, 1905, until November 1, 1912. The defendants answered the complaint, denying any partnership relation. This issue was tried to the lower court and upon such trial the court found that a partnership existed between those dates between the parties, in a hay business which was conducted by the partnership, but that the partnership did not include other branches of the business conducted in the name of the defendant John L. Craib. The court thereupon ordered a reference for an accounting between the parties. A referee was appointed to take the testimony and make findings and conclusions thereon and report the same to the court. Thereafter the referee heard the evidence for a period of twenty days. The evidence was taken down in shorthand by a stenographer. After considering all the evidence and numerous exhibits, the referee concluded that there was a final balance in favor of the plaintiffs in the sum of \$7,805.87, upon which they were entitled to interest from November 1, 1912, at the rate of six per cent per annum. The referee filed a lengthy report stating the substance of the evidence, but the shorthand notes of the reporter were not transcribed and were not filed with the referee's report. The referee stated as follows:

"The hearing in this accounting took at least 20 days in the actual taking of testimony. The evidence is very voluminous. To make a transcript of the evidence would cost a large sum of money and I do not consider the same necessary for the reason that the testimony of the chief witnesses, Hopkins, Butler and Coburn for the plaintiff, and Craib, Johnstone and Anderson for the defendant is shown on numerous reports, statements, schedules, reconciliation sheets, etc., etc., introduced as evidence. Said papers have been tied up in two bundles and each marked 'Special Ac-

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counting Data' and deposited with the clerk of the court, together with the other exhibits in the case. These papers make explicit reference to the original books and records introduced as exhibits in the hearing before me. I have endeavored in my findings to fairly state the testimony of the other witnesses who testified. I believe that the court can intelligently review my findings from an examination of this data and the exhibits without a transcript of the evidence. I feel that neither party should be put to this expense."

Upon the filing of the report of the referee, exceptions were taken thereto by the defendants. A motion was made by the plaintiffs for a confirmation of the report. Upon a hearing of these exceptions and the motion, the court confirmed the report of the referee and entered a judgment accordingly. The defendants have appealed from that judgment.

They argue, first, that there is a variance between the pleading and the proof, by reason of the fact that the complaint alleged a partnership in the entire business, while the court found that the partnership consisted only in the hay business, which was a part only of the whole business. Appellants argue that a partnership is a contract which necessarily involves a meeting of the minds of the parties, and that, since there was no meeting of the minds of the parties upon the whole business conducted, there was a fatal variance between the pleading and the proof. We think there is no merit in this contention. The mere fact that the respondents alleged a partnership in the whole business did not prevent them from proving, or the court from finding, that the partnership consisted in a part of the business only. We think it cannot reasonably be said that respondents failed in the proof because they failed to establish the exact allegation of the complaint.

In the order of reference the court directed the referee to find the capital invested and used con-

tinuously in the business of the partnership, and to allow interest thereon if the same was furnished by the appellants. The referee found that \$10,000 was furnished by the appellants and used continuously in the business, but also found that the appellants had withdrawn large sums of money from the partnership business, and that the interest on the withdrawals would completely offset the interest which would otherwise be due them on the \$10,000 capital. The appellants argue that they are entitled to interest upon this \$10,000, but we think it is apparent that, if they withdrew large sums of money from the partnership funds—as the referee found—and the interest on these withdrawals would offset the interest on the invested capital, in justice and equity they should not be allowed interest on the \$10,000 of capital.

The appellants argue that the court erred in allowing a large number of items which are referred to in the briefs. We have carefully read the report of the referee with reference to these, and we are satisfied that the referee found correctly upon all these items. It would be useless to extend this opinion by referring to each one of them separately.

The appellants next complain that the court erred in refusing to require the referee to have transcribed and to file all the evidence taken before him, because the order of reference and the statute, Rem. Code, § 375, provide that the referee shall file with his report the evidence received upon the trial. Appellants argue that, because the statute so provides, it is mandatory upon the court to require the referee to have the reporter's notes transcribed and to file all the evidence received upon the trial. As shown by the report of the referee in the paragraph hereinbefore quoted, the evidence was very voluminous, and to make a transcript thereof would cost a large sum of money. There is no

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showing in the record that the appellants offered to advance the money necessary to obtain a transcript of the evidence, and we are of the opinion that this provision of the statute is mandatory only in cases where the means are provided by a complaining party to transcribe shorthand notes taken as in this case, and that, where there was no showing to the effect that the party complaining had paid or offered to pay the costs of making such transcript, it was not obligatory upon the court to order the referee to have the notes transcribed and filed in the case. Furthermore, we think the statement of the referee to the effect that the evidence of the chief witnesses could be found in the "reports, statements, schedules, reconciliation sheets, etc.," and that he fairly stated the testimony of the other witnesses, was sufficient under the statute. We are of the opinion, therefore, that it was not error for the court to refuse to require the shorthand notes to be transcribed and filed in the case.

It is next argued that the court erred in not striking certain items from the cost bill. It is contended that it was the duty of the witnesses to report their attendance at the close of each day's session, and that, since this was not done, certain witnesses were not entitled to witness fees. We find nothing in the record to indicate that the witnesses did not report their attendance on each day. It will be assumed, in the absence of a record to the contrary, that the witnesses who appeared or were examined upon the trial before the referee were entitled to compensation as witnesses.

We have examined the record quite carefully and are satisfied that the trial before the referee was fairly conducted, and that he exercised more than ordinary care in considering the evidence of the witnesses and in preparing and filing his report, and that the trial court properly confirmed the same.

We find nothing in the record to justify a reversal. The judgment is therefore affirmed.

ELLIS, C. J., and HOLCOMB, J., concur.

[No. 14865. Department Two. April 23, 1918.]

In the Matter of the Estate of JOHN A. BROWN.
SAMUEL STROM, *Petitioner for the Appointment as*
*Administrator etc., Appellant.*¹

WILLS—VALIDITY—WITNESSES—NECESSITY. A written will without witnesses is invalid, under Rem. Code, § 1320, requiring wills to be attested by two subscribing witnesses in the presence of the testator.

WILLS—NUNCUPATIVE WILLS—TIME FOR PROBATE. The probate of a nuncupative will is properly denied where no proof was offered within six months after speaking the words, as expressly required by Rem. Code, § 1331.

WILLS—HOLOGRAPHIC WILLS—VALIDITY. The statutes of this state providing the kind of wills that may be executed and the manner of their execution, modifies the common law with reference to holographic wills executed without witnesses; since no provision was made for holographic wills.

Appeal from an order of the superior court for Snohomish county, Bell, J., entered June 25, 1917, denying the probate of an alleged will. Affirmed.

Frank L. Kuhn, for appellant.

MOUNT, J.—This appeal is from an order of the lower court denying the probate of an alleged will. The will is as follows:

“Sam Strom’s Homestead, 2-19-1904.

“I am sick to death, am 59 years old, have no relations. If I die I want my friend Sam Strom to have all my belongings, real and personal; my homestead down the river, my rifle, my books, clothes, dishes, and tools. And as a part of this will, it shall be the duty

¹Reported in 172 Pac. 247.

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of Sam Strom to lay me to rest in Arlington Cemetery; and further, in case of Strom's failure to return or failure to take me to Arlington, this will is void, my property to go to the state of Washington.

"Sick and alone I here sign my name. God be my witness in the absence of others. (Signed) John A. Brown."

The trial court denied the petition for the reason that the will was not executed in accordance with the laws of this state. The statutes of this state recognize two kinds of wills: written wills and nuncupative wills. Section 1320, Rem. Code, provides that:

"Every will shall be in writing, signed by the testator or testatrix, or by some other person under his or her direction in his presence, and shall be attested by two or more competent witnesses, subscribing their names to the will in the presence of the testator."

Section 1330 of the same code, in reference to nuncupative wills, provides that:

"No nuncupative will shall be good when the estate bequeathed exceeds the value of two hundred dollars, unless the same be proved by two witnesses who were present at the making thereof, and it be proven that the testator, at the time of pronouncing the same, did bid some person present to bear witness that such was his will, or to that effect, and such nuncupative will was made at the time of the last sickness and at the dwelling-house of the deceased, or where he had been residing for the space of ten days or more, except where such person was taken sick from home and died before his return. Nothing herein contained shall prevent any mariner at sea or soldier in the military service from disposing of his wages or other personal property by nuncupative will."

Section 1331 provides that:

"No proof shall be received of any nuncupative will unless it be offered within six months after speaking the testamentary words, nor unless the words, or the substance thereof, be first committed to writing, and

a citation issued to the widow or next of kin of the deceased, that they may contest the will if they think proper.”

If the will in this case is held to be a nuncupative will, it was not offered for probate within the six months, for it was made in February, 1904, and was not offered for probate until June, 1917. If it was offered as a written will, it was not executed in the manner required by § 1320, Rem. Code, *supra*. In either event the will was invalid.

It is argued by the appellant that, inasmuch as our statute makes no provision for holographic wills, the common law prevails in this state, and therefore the will, being a holographic will, is valid and subject to probate. If it may be conceded that capacity to make a holographic will existed at common law and that the common law prevails in this state when not modified by statute, it is clear that the common law has been modified by statute in this state, because no provision was made for such wills. As stated above, the legislature has defined wills and how they shall be executed and by whom, and no provision is made for holographic wills. In the case of *Strand v. Stewart*, 51 Wash. 685, 99 Pac. 1027, we said:

“The right to make a testamentary disposition of property is neither a natural nor a constitutional right. Such right is derived from and rests in positive law. A will is said to be ambulatory until the death of the testator, and until that event occurs the testamentary disposition is subject to the will of the testator, and likewise to the will of the state as expressed in its public laws. The will speaks as of the date of the testator's death, and must conform to the laws in force at that time. These rules are elementary and need no citation of authority in their support. While the legislature may not interfere with or divest estates which have already become vested through the death of the testator, its power over wills, the manner

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of their execution, and the mode of carrying out their provisions, is absolute and supreme until death occurs."

It follows, therefore, that, because the legislature of this state has enacted laws providing for the kind of wills which may be executed and the manner of their execution, those forms of wills not provided for are not recognized. Appellant cites and relies upon the case of *Eaton v. Brown*, 193 U. S. 411. In that case a will similar to the one here was under consideration by the supreme court of the United States; but the only question raised or decided in that case was the proper construction of the will, not its validity, while in this case the validity of the will itself is before us, and not the construction of the will. Of course, in those jurisdictions where holographic wills are valid, a will of the character of the one now under consideration would no doubt be a valid will if it complied with the statutes; but as we have determined above, there is no provision in our statute which permits such a will to be probated. In the case of *Brown v. State*, 87 Wash. 44, 151 Pac. 81, Ann. Cas. 1917D 604, we held that verbal instructions for a will, or words spoken at the time of signing a writing intended as a written will, cannot be proved as a nuncupative will upon its appearing that the written will was not properly executed.

We are satisfied, therefore, that the trial court properly denied the probate of this proposed will: first, because it was not properly executed as a written will; second, because it was not offered in time as a nuncupative will; and third, because a holographic will is not recognized as a valid will in this state.

The judgment appealed from is therefore affirmed.

ELLIS, C. J., HOLCOMB, CHADWICK, and MAIN, JJ.,
concur.

[No. 14394. Department One. April 23, 1918.]

THE STATE OF WASHINGTON, *Respondent*, v.
ELIAS PIERSON, *Appellant*.¹

BANKS AND BANKING—OFFICERS—OFFENSES—INFORMATION—SUFFICIENCY. An information charging a bank officer with making a false statement of the assets with intent to deceive the state bank examiner demanding the same, charges the offense of subscribing to a false statement with intent to deceive any person authorized to examine into the affairs of the bank, rather than the offense of making or publishing any false statement of the amount of the assets or liabilities of the bank, both denounced by Rem. Code, § 3314.

CRIMINAL LAW—APPEAL—OBJECTIONS NOT RAISED BELOW—INFORMATION—DUPLICITY. Objections to an information for duplicity cannot be raised for the first time on appeal, nor at any time after plea of not guilty, unless such plea is withdrawn.

BANKS AND BANKING—OFFICERS—OFFENSES—STATUTES—CONSTRUCTION. Rem. Code, § 3314, of the banking act, defining the offense of knowingly subscribing to or exhibiting false or fictitious papers or securities with intent to deceive any person authorized to examine the affairs of the bank, covers an officer's sworn statement of the assets made upon demand of the state bank examiner, and is not limited to papers that are forged or spurious.

SAME—OFFICERS—OFFENSES—EVIDENCE—SUFFICIENCY. A charge of knowingly subscribing to a false statement of the assets of a bank with intent to deceive the state bank examiner is supported by proof that the statement of the loans and discounts included two drafts amounting to \$5,362 which were not owned by the bank, notwithstanding the fact that there was accrued and unpaid interest due the bank and other resources not included in the statement which would equal or exceed the amount of the two drafts.

CRIMINAL LAW—APPEAL—HARMLESS ERROR—EVIDENCE. Error cannot be assigned on the admission of testimony that was not materially different from the testimony given by the accused.

SAME—APPEAL—HARMLESS ERROR—INSTRUCTIONS. Error cannot be assigned on the reading of the entire statute defining three crimes, when a subsequent instruction was given clearly defining the crime covered in the charge and the jury could not have been misled.

¹Reported in 172 Pac. 236.

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Opinion Per MAIN, J.

Appeal from a judgment of the superior court for Pacific county, Chapman, J., entered March 6, 1917, upon a trial and conviction of subscribing to a false paper with intent to deceive the state bank examiner. Affirmed.

F. D. Couden, George F. Vanderveer, and Lockerby & Wright, for appellant.

John I. O'Phelan (M. M. Richardson, of counsel), for respondent.

MAIN, J.—The defendant in this case was charged, by amended information, with the crime of subscribing to a false paper with intent to deceive the state bank examiner. To this amended information, which will hereafter be referred to as the information, a demurrer was interposed upon the ground that it did not state facts sufficient to constitute a crime. The demurrer being overruled, the cause in due time came on for trial, and resulted in a verdict finding the defendant guilty of the crime charged. A motion for a new trial being made and overruled, the defendant appeals.

The facts sufficient for an understanding of the questions presented may be briefly summarized as follows: For some time prior to the 23d day of June, 1915, the appellant was the cashier and managing officer of the First International Bank, located at South Bend, this state, and continued in that capacity until on or about the 19th day of July, 1915, when the bank was closed by direction of the state bank examiner. The state bank examiner, as he is authorized to do by law, called for a statement of the condition and affairs of the First International Bank at the close of business on the 23d day of June, 1915. Pursuant to this request, the appellant, on July 3, 1915, subscribed and verified a report to the state bank examiner of the affairs and condi-

tion of the bank at the close of business on the 23d day of June. This report was on a blank prepared and furnished by the state bank examiner, and opposite the item of loans and discounts, appears in the appropriate columns \$248,491.66. The information is too long to be here set out in full, but it charges that the appellant, as cashier of the First International Bank, made and subscribed to a false paper, pursuant to the lawful call of the state bank examiner; that the appellant knowingly and wilfully set forth in the report, opposite the item of loans and discounts, that the First International Bank, at the close of business on the 23d day of June, owned commercial paper amounting to \$248,491.66; that this statement of resources was false in this, that there was included therein as part thereof the sum of \$5,362, being the amount of two drafts, commonly called acceptances, of the face value of \$5,477, upon one of which there had been paid \$115; that the bank was not then the owner of these two drafts, and that they were included in the report for the purpose of deceiving the state bank examiner.

The information was drawn under Rem. Code, § 3314, this being one of the sections of the bank act. In this statute three crimes are defined: First, wilfully and knowingly subscribing to, or making or causing to be made, any false statement or false entry in the books of any bank or corporation transacting a banking business; second, knowingly subscribing to or exhibiting false or fictitious papers or securities with the intent to deceive any person or persons authorized to examine into the affairs of the bank; and third, the making or publishing any false statement of the amount of the assets or liabilities of a bank or corporation transacting a banking business. This numerical division of the statute does not appear in the act, but is made here for convenience of reference.

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The appellant's first point is that he was charged with one offense and found guilty of another. In support of this contention, it is argued that the information is drawn under the third division of the statute, and that the appellant was tried and convicted under the second. The information charges that the appellant knowingly subscribed to a false paper with the intent to deceive the state bank examiner. This is the crime defined in the second division of the statute and for which the appellant was tried and convicted. We do not think that the information, even though there may be some surplusage in it, will bear the construction that it was founded upon the third division of the statute. In addition to this, the information was demurred to upon the sole ground that the facts therein stated did not constitute a crime. It was not demurred to upon the ground that more than one crime was charged. Objections to the information because of duplicity cannot be raised for the first time on appeal, nor at any time after the entry of a plea of not guilty, unless such plea be withdrawn. *Territory v. Heywood*, 2 Wash. Terr. 180, 2 Pac. 189; *State v. Snider*, 32 Wash. 299, 73 Pac. 355; *State v. McBride*, 72 Wash. 390, 130 Pac. 486.

Upon the oral argument, if we gathered it correctly, it was stated on behalf of the appellant that the controlling question upon this appeal is that the appellant was not shown to have signed such a paper as he was charged with having signed. In support of this contention it is argued that the false paper mentioned in the statute refers to one which is forged or spurious, and not to one which is duly subscribed to by the person purporting to sign it, and contains an untrue statement in the body of the instrument. If this were the meaning of the statute, the legislature would hardly have used the word "subscribed," because a spurious

or forged document could not well be subscribed by the person purporting to sign it. A case strikingly like this was before the supreme court of the state of New Jersey, in *State v. Twining*, 73 N. J. L. 3, 62 Atl. 402. The defendants in that case were convicted of exhibiting to an examiner of the state banking department a certain false paper, knowing it to be false, with intent to deceive such officer as to the condition of a named bank or trust company of which Twining was the president and the other defendant the treasurer. The false paper consisted of a typewritten copy of a minute of an alleged meeting of the board of directors of the bank or trust company, which meeting was in fact never held. The statute of the state of New Jersey provided that every director, officer or agent of a trust company who wilfully and knowingly should subscribe or exhibit any false paper with intent to deceive any person authorized to examine as to the condition of such trust company should be guilty of a crime. In the course of the opinion it is said:

“It was further argued that, conceding the statute under which this indictment is found, to be valid, the document exhibited in this case cannot be said to be a false paper within the meaning of the act, the contention being that ‘knowingly subscribes or exhibits any false paper’ means negotiable paper, or some paper which is a part of the assets of the bank. We are unable to give this narrow construction to these words, in the connection in which they stand in the statute. We think it means what it says ‘subscribes or exhibits any false paper, with intent to deceive the examiner.’ Any other construction destroys all force to the word ‘subscribes,’ and any construction which sustains the theory that an offense exists by subscribing a false paper also upholds the construction that to exhibit such false paper to the examiner, with intent to deceive, is within the statute. But it is further insisted that ‘the false paper must be one that can deceive the examiner as to

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the financial condition of the corporation.' We agree with that view. We think under the proof that in exhibiting this paper it was the purpose of the defendants to deceive the examiner as to the financial condition of the bank."

It is next contended that the verdict is contrary to the evidence. To this view we cannot subscribe. The evidence shows that the two drafts mentioned were included in the total amount of the loans and discounts reported; but it is said that there was accrued and unpaid interest due the bank and other resources, not included in the statement, which would equal or exceed the amount of the two drafts. This, however, does not meet the situation. The purpose of the report to the state bank examiner was to advise that officer as to the condition of the bank, and in this report it was not contemplated that accrued and unpaid interest, or notes which had been charged off the books of the bank, should be included.

It is next contended that the court erred in permitting a deputy state bank examiner to testify in effect that accrued and uncollected interest and items charged off as losses on the books of the bank were not properly a part of the report to the state bank examiner under the item of loans and discounts. The testimony of this witness upon this question was not materially different from that of the appellant himself. The assignment of error based thereon is not meritorious.

Finally, it is contended that the court erred in the giving of certain instructions and in the refusing of requests proposed by the appellant, but we find no error in this regard. The issues in the case were fully covered by the instructions given. It is true that the court read in full, as a part of the instructions, the entire statute, or what we have designated the three divisions thereof, but in a subsequent instruction the crime cov-

ered by the second division was clearly and specifically defined to the jury. While it was unnecessary for the court to embody the entire statute in the instructions, the jury could not have been misled thereby in view of the subsequent instruction.

The judgment will be affirmed.

ELLIS, C. J., PARKER, FULLERTON, and WEBSTER, JJ.,
CONCUR.

[No. 14570. Department Two. April 23, 1918.]

FRANK B. RHODES, *Respondent*, v. H. K. OWENS *et al.*,
Appellants.¹

EVIDENCE—TO VARY WRITING—EXCHANGE OF PROPERTY—CONTEMPORANEOUS ORAL AGREEMENT. In the absence of fraud or mistake, it is inadmissible to vary the terms of a written contract for the exchange of properties, calling for the execution of a note and mortgage as part of the consideration, by evidence of a contemporaneous oral agreement that the note and mortgage were merely given in exchange for or in lieu of another obligation which the holder of the note was obligated to pay, and which he had not done, and that the consideration failed on that account.

FRAUD—EVIDENCE—SUFFICIENCY. In an action upon a promissory note given in an exchange of properties, a counterclaim for fraud in misrepresenting the water rights appurtenant to the lands received by defendants is properly disallowed, where it appears that defendants made their own personal inspection and fully informed themselves through investigation and the advice of a lawyer as to the water rights appurtenant to the land.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered June 11, 1917, upon findings in favor of the plaintiff, in an action on a promissory note, tried to the court. Affirmed.

Bogle, Graves, Merritt & Bogle, for appellants.
Saunders & Nelson, for respondent.

¹Reported in 172 Pac. 241.

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Opinion Per MOUNT, J.

MOUNT, J.—This appeal is from a judgment upon a promissory note. The complaint of the plaintiff is the usual form upon a promissory note, dated March 30, 1914, due on the 12th of April, 1916, and executed by the defendants. The answer of the defendants admits the making and delivering of the note and alleges affirmatively, in substance, that, prior to the making of the note, the plaintiff and one H. Victor Owens, who was the son of the makers of the note, agreed by contract in writing that the plaintiff would deed to H. Victor Owens and his father, H. K. Owens, a farm in the state of Oregon, known as the Gladmar Farm; that, in exchange therefor, H. K. Owens and son agreed to deed to the plaintiff a farm in Thurston county, Washington, known as the Jenks Farm, and certain residence property in Seattle; and also to execute and deliver to the plaintiff a mortgage on the Gladmar Farm in the sum of \$4,800, payable as provided in the promissory note described in the complaint; that, pursuant to and in execution of said agreement, plaintiff executed and delivered a deed to the Gladmar Farm to H. K. Owens, and H. Victor Owens executed and delivered a deed to the plaintiff for the Jenks Farm; that H. K. Owens and wife executed and delivered a deed to the residence in Seattle, and executed and delivered to the plaintiff the note sued upon, secured by a mortgage on the Gladmar Farm for \$4,800; that, by mutual consent, the deed to the Gladmar Farm was taken in the name of H. K. Owens in trust for H. Victor Owens, and that the note was not to be the personal obligation of the defendants, but was signed as a part of the mortgage and to evidence the terms upon which the mortgage was to be payable, and it was mutually understood and agreed that the making of said note was without further and other consideration. It was further alleged that the Jenks Farm, owned by H. Victor Owens, was conveyed

subject to a mortgage of \$4,800, which was an incumbrance thereon, and the mortgage executed by defendants upon the Gladmar Farm was to secure plaintiff for any payment he should make upon the mortgage upon the Jenks Farm, and that there was no other consideration therefor; that plaintiff has not paid or discharged the mortgage upon the Jenks Farm or become personally liable thereon. And it was further alleged by the defendants that the note was signed without consideration and that the consideration therefor had wholly failed.

The answer thereupon alleged a counterclaim to the effect that the exchange of the properties was brought about by misrepresentations on the part of the plaintiff in regard to water rights which were fraudulently represented to be appurtenant to the Gladmar Farm; that the defendants relied upon the fraudulent representations and were induced to exchange properties thereby; that there were no water rights appurtenant to the Gladmar Farm; and that the defendants had been damaged in the sum of \$12,500. In reply to these allegations, the plaintiff admitted the contract for the exchange of properties as alleged in the answer, but denied all the other allegations. Upon these issues the case went to trial.

After the plaintiff had introduced the note in evidence and rested, the defendants offered to prove that the Jenks Farm, in this state, was owned by H. Victor Owens, the son of the defendants; that there was a \$4,800 mortgage upon this farm; that the note and mortgage mentioned in the answer upon the Gladmar Farm were given merely in exchange for the mortgage upon the Jenks Farm; that the mortgage upon the Jenks Farm of \$4,800 had not been paid by the plaintiff, and that there was no consideration for the note on that account. The trial court sustained the plain-

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tiff's objection to this offer of proof, and the defendants now contend that this was error.

The contract for the exchange of the properties was in writing. It provided that the plaintiff, Frank B. Rhodes, should convey the Gladmar Farm, in Oregon, to the defendants for the Jenks Farm and the residence property in Seattle, and that, as a part of the consideration, the defendants should execute a mortgage on the Gladmar Farm to the plaintiff for \$4,800. The exchange of the properties was made pursuant to this contract, and the note sued upon was given to the plaintiff and secured by a mortgage upon the Gladmar Farm. The written contract is explicit that this mortgage should be given. The note upon its face is a plain promissory note, and neither the note nor the contract express any conditions which might avoid either the note or the mortgage. The offer of proof made by the defendants clearly is an attempt, by oral evidence, to vary the terms of the note and the written contract by showing that the note sued upon was a note subject to be defeated by a condition subsequent. In the case of *Post v. Tamm*, 91 Wash. 504, 158 Pac. 91, we said:

"The rule is well settled that, in the absence of fraud or mistake, a contemporaneous oral agreement limiting or exempting the maker of a note from liability cannot be shown as a defense to an action upon the note. In *Anderson v. Mitchell*, 51 Wash. 265, 98 Pac. 751, it was said:

" 'It has been repeatedly held by this court that, in the absence of fraud or mistake, it is incompetent for one who signs a promissory note as principal to set up an independent collateral agreement limiting or exempting him from liability . . . ' (Citing authorities.)

"The rule which permits oral testimony for the purpose of showing that a note had never been delivered, and was not intended to take effect until the happening of a certain event, is not here applicable. That rule

relates to a condition precedent. In the absence of the condition being performed, there is no valid delivery of the note, and hence no obligation as between the parties.

"In this case the execution and delivery of the note is admitted and the obligation thereof recognized; and, for the purpose of defeating it, reliance is placed upon a contemporaneous oral agreement by which a condition not precedent, but subsequent, was offered to defeat liability. If a contemporaneous oral agreement providing for the surrender of the note upon the happening of a condition subsequent could be used to defeat recovery upon a note, the rule which provides that a note or other written contract cannot be varied or modified by such an agreement would be abrogated."

We think it is plain that the rule in that case is applicable here, and the trial court was right in excluding the offered evidence. One of the cases upon which the appellants rely is *Ware v. Allen*, 128 U. S. 590. That was a case where there was a condition expressed in the note which provided that, if the condition was not complied with, the note was void. In that kind of a case it is plain that oral evidence would be admissible to show that the note never became effective, and the court so held in that case. But in the case now before us, there was no condition, either in the note or in the contract, that the note should not become effective at once; and the appellants now seek to show that there was an oral agreement outside of the note at the time the note was executed, and that it was given in lieu of another obligation which the holder of the note was required to pay and which he has not paid. If the appellants may show this contemporaneous oral agreement, then they may, by oral evidence, vary the terms of the note and the written contract, which clearly cannot be done under the rule in *Post v. Tamm*, *supra*.

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The appellants further argue that the court was in error in dismissing their counterclaim upon the cross-complaint. The testimony offered on behalf of the appellants upon this cross-complaint shows, we think, that they did not rely upon the representations of the respondent in regard to the water rights upon the Gladmar Farm. Even if the representations made by the respondent induced the trade of the farms, it is plain that the appellants did not rely upon those representations, because they made an independent investigation thereof. They went down to the farm, examined it, saw the condition of it, inquired of neighbors as to the water rights, consulted at least one lawyer, had his written opinion, and were advised as fully as was the respondent of the character of the water rights upon the land. In view of this independent investigation made by the appellants prior to the trade, we think it is plain that the trial court did not err in concluding that the appellants did not rely upon the representations of the respondent, alleged to have been made with reference to the water rights.

We find no error, and the judgment must therefore be affirmed.

ELLIS, C. J., HOLCOMB, and CHADWICK, JJ., concur.

[No. 14612. Department One. April 23, 1918.]

THE STATE OF WASHINGTON, *Respondent*, v. FRANK
MUSSELMAN, *Appellant*.¹

CRIMINAL LAW—CONTINUANCE—ABSENCE OF WITNESSES—ABUSE OF DISCRETION. It is error to force one accused of murder to trial within twenty-five days after filing the information, and to deny a continuance in order to secure absent nonresident witnesses, where the killing was admitted and the only defense was insanity, and it appears that the accused had only recently arrived in this state, and witnesses from North Dakota made affidavit as to material, competent and important facts bearing on the issue of insanity which they would testify to, if the case were postponed until after harvest, and reasonable probability of their attendance in such case was assured.

Appeal from a judgment of the superior court for Okanogan county, Neal, J., entered August 21, 1917, upon a trial and conviction of murder in the first degree. Reversed.

Wm. O'Connor, for appellant.

Chas. A. Johnson and *A. J. O'Connor*, for respondent.

WEBSTER, J.—The defendant was convicted of the crime of murder in the first degree, and appeals. The only assignment of error it will be necessary to notice is that the court abused its discretion in denying appellant's application for a continuance upon the ground of absent witnesses. The facts pertinent to this inquiry, briefly stated, are these: On July 12, 1917, the prosecuting attorney of Okanogan county filed in the superior court an information charging that, on July 6, 1917, the defendant committed the crime of murder in the first degree by shooting and killing Opal Harmeson. On the same day, the appel-

¹Reported in 172 Pac. 346.

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lant was arraigned and entered a plea of not guilty. Being without funds, the appellant was unable to employ counsel, and the court appointed William O'Connor, Esq., to represent the accused upon the trial of the charge contained in the information. At that time the cause was set for trial on August 8, 1917. In the meantime, Mr. O'Connor, with commendable diligence and industry, made a careful examination of the case, and on August 6, 1917, asked and obtained leave of court to interpose the statutory plea of mental irresponsibility, which was filed on the following day. On August 6, 1917, he applied to the court for an order continuing the trial of the cause to November, 1917, for the purpose of enabling the defendant to procure material and necessary evidence to establish the plea of mental irresponsibility, and in support thereof, filed the following affidavit:

“William O'Connor, being first duly sworn, on oath deposes and says that he is the attorney for the defendant in the above entitled action; that the defendant cannot safely proceed to trial on the date set, to wit, August 8, 1917, on account of the absence of material testimony. Affiant states that he was appointed to defend Frank Musselman at the time the said defendant was arraigned, and that said defendant is now, and was at that time, without funds. That the defendant was a resident of Douglas, North Dakota, and was in the state of Washington for a week or ten days prior to the time the crime charged was committed. That said defendant was arraigned upon the 12th day of July, and at that time the trial was set for the 8th day of August, 1917. That, at that time, this affiant requested that the trial be set for a later date in order to give this affiant more time to look up the case and get testimony, and investigate the case. That this affiant commenced at once to write to relatives and friends of the defendant in an effort to ascertain the facts surrounding the defendant and the deceased and to all possible sources from which information might

be obtained from the data this affiant possessed. That this affiant is satisfied from the data obtained and from observations that the defendant is insane, and has entered a plea of insanity in his behalf. That this affiant has just secured some of this information on the 4th day of August, 1917, by reason of the fact that it must be obtained by correspondence by this affiant. This affiant is assured that if said cause is continued until after harvest is over that Ettie M. Heath of Douglas, North Dakota, will appear and testify in behalf of the defendant to the following facts: That she has known defendant all his life; that, prior to a year ago, the defendant was energetic, cheerful and liked companionship as well as the average man, and was well liked; that, during the past year, the defendant seemed to be wholly preoccupied with himself; that he could not apply himself mentally or physically as he used to; that he became gloomy and self-absorbed and seemed to be studying upon something; that he avoided companionship and kept to himself and seemed to be absent minded and unable to fix his mind and attention upon anything for any length of time. Also that she has been informed that the grandmother of the defendant went insane. That this witness cannot come on account of harvest, but has assured this affiant that she will come voluntarily at a later date.

"Affiant is assured that if said cause be continued until after harvest is over that O. M. Heath, of Douglas, North Dakota, will appear and testify in behalf of the defendant to the following facts: That the defendant, Frank Musselman, worked for him and lived with his family for years; that last year when Frank Musselman, the defendant, worked for a neighbor, he saw him very often up until about the 27th day of June, 1917; that the defendant used to be cheerful, energetic and attentive to his work; that since his return to Douglas, North Dakota, from Kalispel, Montana, something over a year ago, that the defendant became morose, absent minded, seemed to have lost his energy and did not take interest in his work like he formerly did; that he seemed to desire to be alone and seemed to be in a study all of the time and avoided the com-

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panionship of his friends. Affiant is assured that this witness will appear voluntarily.

"Affiant is assured that if said cause is continued until after harvest, which will be about November, 1917, about three months, that G. J. Afdahl, of Douglas, North Dakota, will appear voluntarily and testify on behalf of the defendant to the following facts: That he has been acquainted with the defendant for a number of years; that the defendant worked for him last year upon his farm; that he saw the defendant frequently last year and the spring of this year up to the time the defendant left Douglas, North Dakota, about June 21st, 1917; that he noticed a great change in the defendant in the last year or more; that the defendant used to be cheerful, energetic and attentive to his duties; that during the past year the defendant was morose, absent minded, seemed to have lost his energy and was not attentive to his work as formerly; that he seemed to desire to be alone, and seemed to be in a study most of the time, and acted very peculiar.

"Affiant believes that, if said cause is continued until next fall, that he can secure the presence of the defendant's mother, Mrs. J. B. Musselman, who resides at Burnt River Pumping Station, Alberta, Canada, who will, he is informed, testify that the defendant's grandmother went insane and died insane, and that as a child, defendant had convulsions; that the last heard from his mother, she was quite sick with shock.

"Affiant has tried to secure the presence of these witnesses for the 8th of August, but has been unable to do so, but is assured that they will appear later. That he cannot secure this evidence from any other source, or within the state of Washington at any time from any source, within the state at this time and within call of the process of the court. That all of this evidence is very material on the question of the insanity of the accused at the time of the commission of the crime charged, and it would be unsafe for defendant to go to trial without it; that this affiant has been unable to secure this evidence elsewhere and has no other evidence to cover the facts set forth and covered by their testimony. All of these witnesses have never

been within the state so they could be reached by summons of the defendant, and that the facts are part of the chain necessary to establish defendant's plea."

In addition thereto, counsel for defendant filed separate affidavits of all the persons named as witnesses whose evidence he desired to obtain in support of the plea of insanity, with the exception of appellant's mother. These affidavits verify the statements made in counsel's affidavit as to the testimony they would give and their willingness to appear as witnesses upon the trial "if subpoenaed by the state of Washington," in the event the cause should be continued until after the harvest season in North Dakota.

The application was denied and the cause proceeded to trial on August 8, 1917, as originally fixed by the court. Upon the trial the killing was admitted, the sole defense relied upon being that, at the time of the shooting, the defendant was insane and legally irresponsible for his acts. The only witnesses in defendant's behalf were himself and Dr. C. W. Lane, who, testifying as an expert without compensation, expressed the positive opinion that appellant was insane, the form of his insanity being paranoia. While Dr. Lewis, called in behalf of the state, testified that, in his opinion, appellant was sane, he also said that his opinion might be materially modified if he knew more of appellant's history.

It will require no argument to demonstrate that the evidence which it is said the absent witnesses would give was material, competent and highly important to the accused, and that reasonable diligence, under the peculiar circumstances which confronted appellant's counsel, was employed for the purpose of procuring the attendance of the witnesses. If the action of the court is to be sustained, it must be so upon the ground that the witnesses were not subject to the compulsory

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process of this state and there was no reasonable probability that they would be present if the trial of the cause was postponed. The request of the defendant was not an unreasonable one. It might very well be that witnesses from agricultural districts would be willing to volunteer their presence at a time when they could do so without great sacrifice, when they would not be willing to appear if it entailed the loss of their crops, a condition which the courts ought to understand and appreciate.

The spirit of our institutions is such that every person accused of crime shall have a fair and reasonable opportunity of preparing his defense and producing in court the witnesses upon whose testimony he relies for an acquittal. This rule is not prompted by any undue consideration of the rights of the defendant alone, it being a matter of vital importance to society itself that trials be fairly conducted and that full means of preparation be granted the prisoner, to the end that punishment shall be visited only upon the guilty.

With reference to the question of whether a continuance should be granted upon the ground of absent witnesses who are without the territorial jurisdiction of the court, the modern rule seems to be that the mere fact of such nonresidence is not of itself a sufficient reason for denying a postponement of the trial, provided it is made to appear that there is reasonable probability of such witnesses being produced in the event a continuance is granted. Mr. Freeman, in his copious note to the case of *Blackburn v. State* [48 Tex. Cr. 286, 87 S. W. 692], 122 Am. St. 743, treating of this subject, at p. 752, says:

“When a witness is beyond the jurisdiction of the court, it is not error to refuse a continuance on the ground of his absence, when it does not appear that there is any ground to expect his attendance in future.

Upon this general proposition there is no conflict of opinion, but whether a continuance should be denied merely because an absent witness resides out of the state, and is, therefore, not amenable to process, is a question which seems to have given the trial courts a good deal of trouble, some judges being of the opinion that they had no discretion under such circumstances, but that the continuance must be denied. This, however, is a mistake, for, as we shall see, the granting of a continuance is as much within the discretion of the trial court when the absent witness is a nonresident or temporarily out of the state, as if he was in the state. In both instances, the only question to be considered is the probability of securing his testimony at a future trial if the case is continued."

In 6 Ruling Case Law, at page 559, it is said:

"The general rule is that a continuance will not be granted unless it is shown that the testimony of the witness whose presence is desired can in all probability be secured at a future trial. Under this rule a continuance has been properly denied where the witness was beyond the jurisdiction of the court and not subject to its process. The mere fact that a witness is in another state and therefore not amenable to the process of the court should not, however, be conclusive of this question. The granting of a continuance is as much in the discretion of the court where the absent witness is a nonresident or temporarily out of the state as where he is in the state. The inquiry in either case is the same. Are there reasonable grounds to believe that the presence of the witness will be had if the case is continued? But naturally if a witness is beyond the jurisdiction of the court and it does not appear that there is any ground to expect his attendance in the future, a continuance on the ground of his absence will be denied."

In *White v. Commonwealth*, 80 Ky. 482, Judge Hines, delivering the opinion of the court, said:

"Whether the witness is a resident of the state or nonresident and absent from the state, the inquiry in

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either case is the same: Is the evidence material, has diligence been used to secure his attendance, and are there reasonable grounds to believe that the presence of the witness will be had by a continuance? The question is not whether the court can enforce the attendance, because if that were true a continuance could not be had on account of the absence of a citizen of this state, who was at the time within the jurisdiction of another sovereignty. In neither case could coercive process be applied. The right to a continuance in either case would depend upon the probabilities of the witness coming within or submitting himself to the jurisdiction of the court."

In *Brown v. State*, 65 Ga. 332, Chief Justice Jackson, speaking to this question, observed:

"Whilst therefore the general rule is that cases will not be continued for absence of witnesses outside the reach of the compulsory process of the court, yet where there has been no lack of diligence, where the witness has promised to attend, where the testimony is of great materiality, where the application is not made for delay, but there is a reasonable expectation that the testimony will be on hand within a reasonable time, the case should be either continued for the term or postponed to a day certain, so as to give the defendant an opportunity of procuring the witness."

Does the record here disclose that there is reasonable probability that the absent witnesses, or some of them, will appear and testify if they are afforded a reasonable opportunity of doing so? The very fact that the absent witnesses were sufficiently interested to make the affidavits is some indication of their willingness to testify. If it were not for the clause "if subpoenaed by the state of Washington" inserted in the several affidavits we would have no hesitancy in saying that there was a reasonable probability that the witnesses would appear and testify. If a literal construction is placed upon that language it is perfectly

plain that the absent witnesses have conditioned their coming to the state upon terms which it is impossible to meet. Palpably the state of Washington cannot effectively subpoena witnesses in the state of North Dakota. We do not deem it fair, however, to separate these words from the body of the affidavits and attach all-controlling significance to them and ignore the remainder of the affidavits. It seems plain that the witnesses intend to come under some reasonable conditions. We think the words were inserted for the purpose of indicating that the witnesses desired to be assured of receiving their legal fees and allowances; and if they volunteer to come to the state they will be entitled to mileage from the point where they cross our border, together with witness fees during their attendance upon the court. If, however, it be assumed that these witnesses would not come to this state unless their entire expenses were paid, the appellant has had no reasonable opportunity of communicating with his relatives and friends looking to the securing of funds for that purpose.

Let it be remembered that the appellant is a stranger within our gates. No one subject to the compulsory process of the courts of Washington, save the relatives of the deceased girl, know anything concerning the life and history of the accused. All of these facts, however, are peculiarly within the knowledge of appellant's mother, and surely no court would be justified in assuming that she would fail her son in this the hour of his extremity.

We cannot overlook the fact that the accused was forced to trial with unusual haste, only twenty-five days elapsing between the date counsel was appointed to defend him and the beginning of the trial. The state of Washington, in the enforcement of its criminal laws, does not demand any victims, and before this court

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should put the seal of its approval upon a conviction of one accused of a heinous crime, as the result of a trial wherein he was denied all opportunity of presenting evidence upon the single and vital issue in the case, it should pause and seriously consider. It seems to be more in keeping with the orderly and wholesome administration of justice to afford the accused a fair chance of presenting his case and procuring his witnesses, than to indulge in fine spun theories or speculations as to whether such course will avail him anything.

While the matter of granting continuances because of the absence of witnesses is largely within the sound discretion of the trial court, and, as a general proposition, its ruling will not be disturbed except in cases where manifest injustice has resulted, yet it is the duty of appellate courts to reverse such rulings in cases where a fair trial has been denied. As said by Cobb, J., in *Ryder v. State*, 100 Ga. 528, 28 S. E. 246, 62 Am. St. 334, 38 L. R. A. 721:

“W. L. Ryder was indicted for the offense of murder. His defense was that he did not commit the homicide charged in the indictment, and that if he did, he was insane at the time the killing was done. . . . In a case like the present, where there has been a shocking homicide, and where there can be scarcely a doubt that the accused committed it, although he does not expressly so admit in his plea, the defense mainly relied on being that of insanity at the time of the killing, it was depriving the accused of a very great right when he was forced to trial in the absence of these four witnesses, who knew the facts that were material to his defense, and whose presence was important to the proper determination of the issue.”

While we are loath to disturb the verdict, we are forced to the conclusion that the learned trial court abused its discretion in denying appellant's application

for a continuance, and because of this error, the judgment will be reversed, and the cause remanded for a new trial at such reasonable time in the future as will afford appellant a fair opportunity of having his witnesses present.

ELLIS, C. J., PARKER, and MAIN, JJ., concur.

[No. 14467. Department Two. April 24, 1918.]

M. B. KIES, as *Receiver of the Commercial Bank of Vancouver, Appellant*, v. JOHN WILKINSON,
*Respondent.*¹

BANKS AND BANKING—GENERAL OR SPECIAL DEPOSITS—PUBLIC FUNDS. A deposit in a bank of public funds, by a county clerk as such, constitutes a general and not a special deposit, in the absence of any statute requiring him to deposit funds in a bank.

SAME—INSOLVENCY—GENERAL DEPOSIT—PUBLIC FUNDS—PREFERENCE. Such a general deposit is not a public or trust deposit which, in case of insolvency of the bank, would have any preference over other creditors; since there was no understanding that the particular money should be returned, it was not to be used for a specially designated purpose, and the deposit was not wrongful or unlawful.

SAME—INSOLVENCY—UNLAWFUL PREFERENCE—LIABILITY—POWERS OF STATE BANK EXAMINER. The state bank examiner, in control of an insolvent bank, being the representative of the state without authority to act for the officers of the bank, has no authority, by his approval, to relieve the officers and a depositor from liability for making an unlawful preference to the depositor by turning over collateral or paying the deposit in full, regardless of good or bad faith; and they are liable therefor in tort, in case of insufficiency of assets.

SAME—INSOLVENCY—ACTION TO RECOVER PREFERENCE—COMPLAINT—SUFFICIENCY. In an action by a receiver of an insolvent bank to recover in tort from a depositor and the officers the amount of an unlawful preference made after insolvency, the complaint must allege that the assets in the hands of the receiver are insufficient to pay the creditors.

¹Reported in 172 Pac. 351.

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PLEADING — AMENDMENT — TO CONFORM TO PROOF. Where a receiver's complaint in an action to recover damages from an unlawful preference failed to allege that the assets were insufficient to pay the debts, and a demurrer was erroneously overruled, upon offer of proof at the trial, the complaint should be deemed amended and proofs taken upon the issue tendered.

Appeal from a judgment of the superior court for Clarke county, Darch, J., entered July 2, 1917, upon findings in favor of the defendant, in an action by a receiver to recover money paid to a creditor of an insolvent bank, tried to the court. Reversed.

McMaster, Hall & Drowley, for appellant.

Miller & Wilkinson and *A. E. Clarke*, for respondent.

HOLCOMB, J.—On December 17, 1910, the state bank examiner took charge of the Commercial Bank, a state bank doing business at Vancouver, acting under the authority of § 3305, Rem. & Bal. Code, now repealed.

Respondent was then county clerk of Clarke county and maintained an ordinary checking account with the bank under the name of John Wilkinson, county clerk of Clarke county, and when the bank was taken in charge, the balance to his credit was \$3,502.48.

Up to December 17, the respondent had never been given any security of any kind, but on or within two or three days after that date the bank turned over to respondent a promissory note for \$11,000, given to the bank by one Harvey. This seems to have been done at the instance of the president of the bank, and he and the cashier seem to have led the deputy state bank examiner in charge to believe that the possession of this note belonged to respondent as collateral security for his account. Respondent accepted the collateral offered and retained it as security for his account for a little over two weeks, at the end of which time he was called upon to surrender it, and received payment from the deputy bank examiner of his account in full.

The examiner continued his possession of the bank and investigation of its affairs for about two months longer, and being then convinced that the bank was insolvent, caused proceedings for the appointment of a receiver to be carried through by the *Attorney General*. The bank was then duly adjudged insolvent, and appellant was appointed its receiver in March, 1911. Upon his appointment, the receiver investigated the matter, and being convinced that the payment of respondent's account in full was without authority and an illegal preference, he demanded repayment of the same. Repayment being refused, he began this action in tort to recover as damages the sum of \$3,502.48 paid over to respondent, alleging that the respondent and the other defendants named, cooperating and participating together, caused to be assigned, set over, transferred, and delivered to respondent the note heretofore mentioned, and the respondent, participating with them, received the note as and for collateral security for the payment of his account. It was alleged also that the note was a part of the general assets of the bank, and was given and received as above stated with the intent and for the purpose on the part of all the parties to the transaction of wrongfully preferring the respondent, Wilkinson, over other general creditors of the bank. It is also alleged that, in pursuance of the above intent and purpose, the defendants all cooperating and participating, on about January 7, 1911, the other defendants caused to be paid over to respondent the sum of \$3,502.48 in full payment of his account and deposit, and that thereupon respondent surrendered the pretended collateral security above mentioned; that it was the intent and purpose on the part of all the defendants, parties to the above transaction, that respondent should be wrongfully preferred to the other general creditors of the bank; that, by reason of the

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foregoing acts and doings of all the defendants, the Commercial Bank of Vancouver was damaged in the sum so taken, and the funds and assets of the bank depleted by that amount. Judgment was demanded for the sum so taken, with interest at the legal rate from January 7, 1911.

A demurrer to the complaint on the part of one of the defendants was sustained by the court. The defendant Mohundro died during the pendency of the action and the action continued against respondent alone.

Respondent demurred to the complaint for insufficient facts. His demurrer, after consideration by the court, was overruled. Respondent then answered, denying part of the complaint and admitting the remainder. There was no affirmative defense. On the issues thus made, the court tried the cause without a jury, and made findings of fact in which all the material allegations of the complaint were found true. Conclusions of law and judgment were nevertheless rendered for the respondent.

There was no allegation in the complaint that the assets in the hands of the receiver were insufficient to satisfy the claims of all creditors. The appellant did, however, after the trial of the cause by the court, ask that the proceeding be reopened and that he be permitted to introduce proof to the effect that the assets of the defunct bank were insufficient to pay any more than twenty per cent, or twenty-five per cent in all, of the claims of general creditors. This application was denied by the court for the reason that the court was of the opinion that it would be immaterial to make such proof, because of his conclusion that, in any event, the respondent was not liable, since the deposit was a deposit by a public officer, as such, of the public funds coming into his hands as county clerk, the deposit

thereby constituting a trust fund which upon the failure of the bank, respondent was entitled to receive back intact.

There is no statute requiring county clerks to deposit funds in their hands as such in any bank, or requiring any bank to be designated as depositary for such fund. While it is true that the funds deposited by respondent as county clerk of Clarke county implied a notice to the depositary that the funds were public funds and not private funds of the depositor, nevertheless the funds were deposited subject to check as an ordinary account, and, as such, constituted a general and not a special deposit.

It is contended by respondent that the deposit by the county clerk, as such, created it a deposit of county funds, or of public funds belonging to litigants in the court of which respondent was clerk. There is a conflict of opinion among authorities as to whether, in the absence of statute, there exists in any political subdivision a common law right to have its debts paid to it in preference to other creditors when the debtor is insolvent. But as applied to insolvent banks in which deposits of public money have been made, the better rule seems to be that, in the absence of statute or a showing of facts sufficient to create a trust, a claim for public money has no preference over the claims of the general creditors of the bank, but stands on the same footing with them. 3 R. C. L. § 182; Note to *Page County v. Rose*, 8 Ann. Cas. 116, and cases there cited. Ordinarily, public money in the hands of its official custodian without special authority to deposit the same in a bank is a trust fund, and when a bank accepts such money knowing its trust character, the bank becomes a *quasi*-trustee and the trust character attaches to the fund in the hands of the bank, making it a preferred claim if it has not been so commingled with

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the other funds of the bank as to have lost its identity. Note, same case, and cases cited therein.

In this case the funds were deposited by the county clerk from time to time and checked against from time to time, and were not one special deposit of a trust character, other than that they constituted a trust fund in the hands of the clerk himself. They were evidently carried in the bank commingled with all its other funds, until the bank was closed for liquidation.

When a bank becomes insolvent and is taken over by the public examiner, the assets of the bank become a fund for the payment of the claims of the various creditors, and unless some reason is shown, recognized by law, that entitles one creditor to a preference over the others, they should all be treated alike. If the assets are sufficient in amount, the creditors can be paid in full, but where there are not sufficient funds to pay the just claims of all of the creditors in full, then such fund as there is should be proportioned among such creditors according to the amounts of their respective claims. This rule applies to all bank depositors. *City of Sturgis v. Meade County Bank*, 38 S. D. 317, 161 N. W. 327; *Cavin v. Gleason*, 105 N. Y. 256, 11 N. E. 504.

As a rule, when money is deposited in a bank, title to it passes to the bank. The bank becomes the debtor of the depositor to the extent of the deposit, and to that extent the depositor becomes the creditor of the bank. *Allibone v. Ames*, 9 S. D. 74, 68 N. W. 165, 33 L. R. A. 585. Such deposit then constitutes a part of the assets of the bank and, in case of insolvency, belongs to the creditors of the bank in proportion to the amounts of their respective claims. Exceptions to this rule are: First, where money or other thing is deposited with the understanding that that particular money or thing is to be returned to the depositor; second, where the money or thing deposited is to be used for a specific-

ly designated purpose; and third, where the deposit itself was wrongful or unlawful. *City of Sturgis v. Meade County Bank, supra.*

The money involved in this case was deposited by the county clerk subject to his check, without any understanding that the identical money deposited should be returned to him or that it should be used for any specific purpose. It cannot be said that it falls within the third exception to the above rule, that the deposit itself was wrongful or unlawful, for while the clerk was responsible for the fund in his hands, he had a perfect right to deposit it in bank wherever he pleased, being responsible for the safety of the funds. *Phillips v. Yates Center Nat. Bank*, 98 Kan. 383, 158 Pac. 23, L. R. A. 1917A 680; *State v. McFetridge*, 84 Wis. 473, 54 N. W. 1, 998, 20 L. R. A. 223; 3 R. C. L. 182.

We are forced to the conclusion, therefore, that the deposit of respondent in the insolvent bank was not a public or a trust deposit.

The question then arises whether or not the officers in the bank were relieved from responsibility because of the approval of the appropriation of collateral to the security of the fund of the respondent and its reduction thereafter into payment of the deposit. At the time of the delivery of the note as collateral, the bank examiner was in charge of the bank through a deputy. The bank examiner, under the law then in force (Rem. & Bal. Code, § 3305), was required, upon taking charge of the bank, to ascertain as soon as possible, by thorough examination into its affairs, its actual condition, and whenever he should become satisfied that the bank could not resume business or liquidate its indebtedness to the satisfaction of all of its creditors, to report the fact of its insolvency to the *Attorney General*, who was thereupon required to institute proper proceedings in the proper court for the

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appointment of a receiver to take charge of and wind up the affairs and business of the bank for the benefit of its depositors, creditors, and stockholders. At the time of the transaction in question, the bank examiner had not closed the bank, but was in charge of its assets. There was no authority conferred upon him by law to act as agent for the bank or its officers, and his sole authority was to act as agent for the state to examine into the affairs and condition of the bank and report its condition as soon as he could ascertain it. He, of course, had the right to require liquidation of the assets of the bank, but no right to make any contract for the bank or to ratify any contract which had been theretofore made. There had been no prior contract between the bank or its officers and respondent for the security of the respondent's funds on deposit. The offering of security by the officers of the bank seems to have been merely voluntary, but for the *bona fide* purpose of securing a public officer's deposit. Neither is there any question of the good faith of respondent. He gratefully accepted security and the subsequent payment of his deposit. At that time he was to some extent justified, although he knew that the bank was in the hands of the state bank examiner, by the fact that the state bank examiner had not declared the bank insolvent and applied for a receiver, and did not thereafter for about sixty days. Appellant does not charge respondent with actual bad faith, but charges only that the taking of the funds by him from the hands of the bank examiner was unlawful and wrongful, inasmuch as the deposit was not a trust deposit; that the funds which had theretofore been deposited could not be traced or identified, and were not county or public funds deposited in the bank as a county depositary or deposited with notice that they were county funds; and that, by reason of these proposi-

tions, the transaction between the officers of the bank and the bank examiner on the one hand and respondent on the other constituted an unlawful preference, regardless of the good or bad faith of the transaction, and *prima facie* damage to the insolvent estate.

These propositions are correct and, as stated in the previous discussion of the trust fund theory of the deposit, there being no such status, respondent had no right to a preference over other creditors of the insolvent. 7 C. J. 629, 643; *Brown v. Sheldon State Bank*, 139 Iowa 83, 117 N. W. 289; *Alston v. State*, 92 Ala. 124, 9 South. 732, 13 L. R. A. 659; *McLain v. Wallace*, 103 Ind. 562, 5 N. E. 911; *Otis v. Gross*, 96 Ill. 612, 36 Am. Rep. 157; *Retan v. Union Trust Co.*, 134 Mich. 1, 95 N. W. 1006; *Southern Development Co. v. Houston & T. C. R. Co.*, 27 Fed. 344; *In re Nichols*, 166 Fed. 603; *Phillips v. Yates Center Nat. Bank*, 98 Kan. 383, 158 Pac. 23, L. R. A. 1917A 680.

This, however, is not an action to set aside a transfer of funds, follow the funds and recover them for the estate, but is an action against respondent and his codefendants for damages for the wrongful taking of the fund. Notwithstanding that the taking of the fund was in law wrongful and unlawful, even in cases arising under the Federal bankruptcy laws, where the procedure against unlawful preferences and preferring debtors to preferred creditors is much more drastic than in this sort of action, it has been generally held that the trustee cannot maintain an action to set aside a preference and avoid a transfer unless it is shown by the complaint that he has not sufficient assets in his hands to satisfy the claims of the debtor. No such showing was made in the complaint, for all that appears there may be money and property enough in the hands of the trustee to pay every claim filed against the debtor. Admitting that the facts stated show the

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transfers to have been fraudulent, still no right to avoid them exists unless it appears that some one was harmed. Having elected to sue for damages, it was incumbent upon appellant to allege and prove a proper measure of damage. The complaint ought to show, and evidence sustain, the amount of the claims filed and the value of the assets in the hands of the trustee, so that the court may determine the necessity of setting aside or recovering the value of the preference. *Mueller v. Bruss*, 112 Wis. 406, 88 N. W. 229; *Deland v. Miller & Cheney Bank*, 119 Iowa 368, 93 N. W. 304; *Roney v. Conable*, 125 Iowa 664, 101 N. W. 505; *Seager v. Armstrong*, 95 Minn. 414, 104 N. W. 479.

In this case it will be observed that, so far as the complaint is concerned, there may be ample money in the hands of the trustee to satisfy and discharge all the liabilities of the estate, if there be any, which does not appear. This is a fatal defect and the demurrer to the complaint should have been sustained.

However, after the trial had closed but before any decision had been rendered, appellant, realizing the probable fatality of that defect, offered to prove the condition of the estate as has been heretofore stated. This was refused by the trial court for the reason that the trial court was of the opinion that, in any event, the respondent was not liable. We are of a different opinion. The respondent is liable only to the extent of the damage sustained by the estate. For that reason the rejected proof should have been received, and the pleadings should have been amended or deemed amended and issues formed thereon so that respondent could meet the proof of appellant upon that phase of the matter. It is possible that the estate will not be damaged more than 75 per cent at the most, and possibly less, of the amount turned over by the bank to respond-

ent. At any rate, it is a matter that should be put at issue and proof received to show the true facts.

The judgment will be reversed, and the cause remanded with instructions to the lower court to reopen the case, sustain the demurrer of respondent, or consider all the pleadings amended to conform to the offer of proof (which amounts to a tender of amendment to the complaint on the part of appellant), receive the evidence of appellant under the offer of proof and that of respondent, if any, and render judgment thereon. This determination also will be without prejudice to the respondent to his right to file a claim with the receiver and receive the same dividends as were given to other general depositors.

ELLIS, C. J., CHADWICK, MAIN, and MOUNT, JJ., concur.

[No. 14492. Department Two. April 24, 1918.]

THE STATE OF WASHINGTON, *on the Relation of
Prudential Savings & Loan Association et al.,
Respondents*, v. JESSE P. MARTIN *et al.*,
Appellants.¹

MANDAMUS—ALTERNATIVE WRIT—FORM—SUFFICIENCY. Rem. Code, § 1016, prescribing the substance and not any particular form for an alternative writ of mandate, is complied with where the writ gives notice that it was issued by a court of competent jurisdiction and notifies the party of the exact thing to be done, or in the alternative that he show cause at a certain time and place why he has not done it.

SAME. An objection that an alternative writ of mandate did not run in the name of the state is met by the fact that it bears the title of the court and cause, which was "State of Washington on the relation," etc.

SAME—FORM—SEAL OF COURT. An alternative writ of mandate cannot be objected to for want of the seal of the court, where the copy served was a certified copy bearing the seal of the court.

¹Reported in 172 Pac. 349.

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Opinion Per ELLIS, C. J.

SAME — FORM — SUFFICIENCY. An alternative writ of mandate signed by one of the judges of the court, reciting that it was "Done in open court," etc., cannot be objected to as being merely an order of a particular judge and not the process of the court.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered September 7, 1917, in favor of the plaintiffs, directing the issuance of a writ of mandamus, after a hearing upon objections to the jurisdiction of the court. Affirmed.

Frank A. Steele and Earl & Steinert, for appellants.

P. Tworoger, for respondents.

ELLIS, C. J.—Action of mandamus, commenced in the superior court of the state of Washington for King county. Relators filed the prescribed affidavit and thereupon obtained an alternative or show cause order which, omitting title of the court, was as follows:

"The State of Washington on the
relation of Prudential Savings
& Loan Association, a corpora-
tion, George E. Tilton, Frank
Atwood, Peter Bettinger, Mary
E. Bettinger, C. T. Scott, Wil-
liam Jaynes, and W. L. Stock-
well, its board of directors,
Plaintiffs,

vs.

Jesse P. Martin, Frank A Steele,
and J. H. Thaw, Defendants.

No. 124282

Alternative Writ
of Mandamus

"The above matter coming on to be heard upon application for an alternative writ of mandate, it appearing to the court from the affidavit of George E. Tilton that the Prudential Savings & Loan Association is entitled to do business in the said state of Washington, as a loan & savings association; that it has a place of business in Seattle, said state, and that George E. Tilton with the other plaintiffs are the board of directors of said association; that said George E. Tilton is the duly elected, qualified and acting president and general

stance, the alternative writ contemplated by the statute.

The objection that the writ here in question did not run in the name of the state, we think is met by the fact that it bears the title of the court and of the cause, which was "State of Washington on the relation" etc. Not only the writ but the affidavit and all proceedings in the cause ran in the name of the state. To have inserted under this title and above the body of the order the words "In the name of the State of Washington" would have added nothing in substance and nothing material in form.

The contention that the writ was not under the seal of the court, we take it, is based upon the fact that the order as entered upon the court's records did not bear the seal of the court. It is not disputed, however, that the certified copy of the order, which is in fact the writ and which was served upon appellants entitled as a writ, bore the seal of the court. It was, therefore, attested by the seal as effectually as any form of order or writ can be.

The last objection, that the order was a mere order of a particular judge and not the process of a court, is a little difficult to comprehend. The order itself shows that it did not purport to be the act of a particular judge as such, but it did purport to be the act of a judge sitting as a court. The closing words are, "Done in open court this 1st day of September, 1917." It bore upon its face all the formal indicia of the action of the court as such. The claim that it was not the process of a court we have already answered. While the order itself was not the process of the court, the certified copy containing the court's mandate in the very terms of the order met every requirement of the statute, which prescribes no particular form. It is true that in the recent case of *State ex rel. Hackett v. Arnest*,

100 Wash. 286, 170 Pac. 563, we held that the writ must be served in the same manner as a summons in a civil action and, therefore, the copy served need not be certified. But in that case the writ apparently followed the usual form of the common law writ. In this case, however, the certified copy of the court's order which, as the record shows, was entitled an alternative writ of mandamus, was so certified as to make it, in substance, the writ required by statute.

We find it unnecessary to review the several decisions of this court cited on either side, for the reason that the statute itself is controlling. None of the cases cited has any direct bearing upon the question here presented.

The argument that our holding would warrant the commencement of a suit on a promissory note by a mere show cause order is without merit. In such a suit jurisdiction can only be acquired by service of a summons, and this simply because the statute so provides. The action of mandamus, however, and other special proceedings of like character, may be commenced by the service of the writ. *Smith v. Ormsby*, 20 Wash. 396, 55 Pac. 570, 72 Am. St. 110; *State ex rel. Cicoria v. Corgiat*, 50 Wash. 95, 96 Pac. 689.

The judgment is affirmed.

MOUNT, PARKER, HOLCOMB, and CHADWICK, JJ., concur.

[No. 14521. Department One. April 24, 1918.]

CHARLES S. FLORENCE, *Trustee etc., Appellant*, v. H. C. DEBEAUMONT *et al., Respondents*.¹

FRAUDULENT CONVEYANCES—BONA FIDE MORTGAGE FROM FRAUDULENT VENDEE—KNOWLEDGE OF FRAUD—IMPUTED KNOWLEDGE—AGENCY OF ATTORNEY. One who, in good faith, loaned money upon the security of a chattel mortgage upon personal property, conveyed by DeB. to D. in fraud of DeB.'s creditors, is not to be imputed with the scrivener's knowledge of DeB.'s and D.'s fraudulent intentions, where it appears that the scrivener's agency for him was limited to advice as to the value of the property, and in drawing the chattel mortgage he was acting as attorney for and was paid by DeB. and D.; and especially where the scrivener in concealing the fraudulent conveyance, colluded with DeB. and D. and thereby practically destroyed any relation of agency for the lender.

Appeal by plaintiff from a judgment of the superior court for Asotin county, Miller, J., entered July 27, 1917, upon findings in favor of the plaintiff as against certain defendants, in an action for equitable relief, tried to the court. Affirmed.

Fred E. Butler and *E. J. Doyle*, for appellant.

C. H. Baldwin, for respondents.

ELLIS, C. J.—Plaintiff, trustee of the estate of H. C. DeBeaumont, a bankrupt, brought this action against DeBeaumont and wife, T. U. Denny and wife, and F. G. Morrison, to set aside, as in fraud of creditors, a deed and bill of sale made by DeBeaumont and wife to Denny, and a chattel mortgage made by Denny and wife to Morrison, and to recover the personal property transferred and mortgaged by these instruments, or its value; and further, to recover from Denny the value of a crop of grain, at the time of the transactions in question growing upon the land conveyed by DeBeaumont and wife to Denny.

¹Reported in 172 Pac. 340.

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Opinion Per ELLIS, C. J.

It was orally stipulated in this court that F. G. Morrison, after plaintiff took this appeal, has died and that Ellen T. Morrison, the duly appointed executrix of his estate, be substituted as respondent in this appeal.

We find it unnecessary to notice the pleadings, further than to say that they sufficiently present the issue of good faith in these transactions. The cause was tried to the court without a jury. The court found in substance that, upon and prior to May 12, 1914, DeBeaumont and wife were the owners, as their community property, of 320 acres of land in Asotin county, Washington, subject to a mortgage for \$9,000 to the Holland Bank; that they also owned certain farm machinery, hogs, cattle, sheep and eight work mules and harness; that the mules were subject to a mortgage of \$500 to the Holland Bank; that there was growing upon the premises, during the seasons of 1914-1915, a crop of grain; that the land and personal property constituted all of the property owned by the DeBeaumonts at that time from which claims of creditors could be satisfied; that, at that time and prior thereto, DeBeaumont was insolvent, owing debts in the sum of \$15,000; that, on May 12, 1914, DeBeaumont conveyed the real estate mentioned to Denny, and on the same day transferred and delivered to Denny all of the above-mentioned personal property and crops on the land; that the deed and bill of sale were filed for record on May 13, 1914, at the request of C. H. Baldwin, attorney for DeBeaumont and Denny; that the deed and bill of sale were without consideration and were made for the purpose of hindering, delaying and defrauding DeBeaumont's creditors; that, at the time of this transaction, DeBeaumont's attorney, Baldwin, was preparing for him a petition in bankruptcy, and that Denny, when he received the deed and bill of sale, knew of

DeBeaumont's insolvency and took the same for the purpose of assisting DeBeaumont in defrauding his creditors; that, for the purpose of securing Mrs. DeBeaumont's signature to the deed and bill of sale, Denny paid to her the sum of \$950, which thereby became community property of the DeBeaumonts; that demand has been made by the trustee for the possession of the land and the delivery of the personal property upon Denny, who has refused to deliver the same, and upon Mrs. DeBeaumont for the \$950, which she also has refused to pay to the trustee. Touching the mortgage from Denny to Morrison, the court specifically found:

"(23) That, on the 12th day of May, 1914, said T. U. Denny made, executed and delivered to F. G. Morrison a chattel mortgage to secure the payment of \$1,500, secured upon the personal property above mentioned and described, including said crop of grain.

"(24) That, at the time said mortgage was made, said F. G. Morrison was unable to leave his home on account of physical injury, and said Chas. H. Baldwin drew up said mortgage and looked after the interests of said Morrison in taking said mortgage.

"(25) That, at said time, said Chas. H. Baldwin was the attorney of the said H. C. DeBeaumont and knew of his insolvent condition.

"(26) That said chattel mortgage given to said F. G. Morrison by said T. U. Denny, as aforesaid, was in consideration of the sum of \$1,500, paid by the said Morrison to the said Denny.

"(27) That said F. G. Morrison took said chattel mortgage without knowledge of the insolvent condition of said H. C. DeBeaumont, and without knowledge of the fraudulent transactions which had taken place between said H. C. DeBeaumont and said T. U. Denny, and was to the extent of his mortgage an innocent purchaser of said personal property covered by his said mortgage.

"(28) That the sum secured by said mortgage was, prior to the trial of this action, repaid to the said F. G.

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Morrison by the said T. U. Denny, and that said mortgage has been satisfied and released.

“(29) That said F. G. Morrison has never received or converted to his use any property belonging to the estate of said H. C. DeBeaumont, bankrupt, as aforesaid.

“(30) That the value of the personal property transferred by said H. C. DeBeaumont to T. U. Denny as aforesaid was \$2,000, and that the landlord's interest in the crops grown on the lands sold by said DeBeaumont to said Denny was of the value of \$950; that the said T. U. Denny should be credited in his accounting with the sum of \$600 paid by him to the Holland Bank to release the mortgage on the mules described in said bill of sale, and with the sum of \$150 paid as interest on the real mortgage held by said Holland Bank, leaving a balance of \$2,200 to be accounted for by the said T. U. Denny to the said trustee.”

Upon these findings and appropriate conclusions of law, the court decreed that plaintiff have judgment against Denny and Mrs. DeBeaumont jointly for the sum of \$950, and interest from May 18, 1913, aggregating \$1,160.58; that plaintiff recover from Denny the further sum of \$1,250, with interest from May 18, 1913, aggregating \$1,517.08, and that plaintiff recover his costs against the DeBeaumonts and Denny. The court further ordered that the action be dismissed as to the defendant Morrison and that he recover his costs. From this order of dismissal as to Morrison, plaintiff appeals.

We have examined the evidence as set out in the abstracts of record with frequent recourse to the statement of facts. We are satisfied that it supports the findings by a fair preponderance in every particular save one. The finding numbered 23 is in error, in that it states that the original chattel mortgage from Denny to Morrison for \$1,500 covered a crop on the land. As a matter of fact, the mortgage on the crop was exe-

cuted on October 20, 1914, for an additional sum of \$285, but we find this fact immaterial, inasmuch as this money was loaned for the purpose, and was used for the purpose, of putting in the crop and was repaid from the crop, so that, in any view of the case, that transaction, both by reason of its date and purpose, was wholly devoid of any fraudulent design or injurious results to DeBeaumont's creditors. It was wholly independent of the main transaction and requires no further notice. The findings being sustained in other respects by ample evidence, we shall treat as established facts that the transfers from DeBeaumont to Denny were made in fraud of DeBeaumont's creditors; that Denny was an active participant in the covinous purpose, but that Morrison had no actual knowledge thereof or of DeBeaumont's insolvency.

It is elementary that the burden of proving fraud is upon the party who asserts it. There was no evidence whatever that Morrison actually knew of DeBeaumont's insolvency or of his purpose in making the transfers to Denny. In fact, the evidence does not show that he was advised, when he made the loan of \$1,500, that Denny was purchasing the chattels from DeBeaumont. Were it not for the fact that the court found, on ample evidence, that the attorney who represented all parties in this transaction knew of DeBeaumont's insolvent condition at the time and was preparing papers for his voluntary bankruptcy, the discussion would end here. But that fact makes it necessary to consider the question of law as to whether, in the light of all the evidence, the knowledge of the attorney must be imputed to Morrison so as to make him in law a participant in the covin of DeBeaumont and Denny.

As to what notice or knowledge of an agent or an attorney will impute notice to the principal or client

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we are committed to the rule stated by Mechem as sustained by reason and authority, as follows:

“The law imputes to the principal, and charges him with, all notice or knowledge relating to the subject-matter of the agency which the agent acquires or obtains while acting as such agent and within the scope of his authority, or, according to the weight of authority, which he may previously have acquired, and which he then had in mind, or which he had acquired so recently as to reasonably warrant the assumption that he still retained it. Provided, however, that such notice or knowledge will not be imputed: (1) Where it is such as it is the agent’s duty not to disclose; (2) Where the agent’s relations to the subject-matter are so adverse as to practically destroy the relation of agency; and, (3) Where the person claiming the benefit of the notice, or those whom he represents, colluded with the agent to cheat or defraud the principal.” 2 Mechem, *Agency* (2d ed.), p. 1397, § 1813.

See, also, *Gaskill v. Northern Assurance Co.*, 73 Wash. 668, 132 Pac. 643. Though this rule is a wholesome one and well sustained by authority, “the courts show a plain determination not to extend it, but to keep it confined within narrow and necessary limits.” 2 Pomeroy, *Equity Jurisprudence* (2d ed.), p. 1169, § 672. An agent or attorney can no more bind his principal by his knowledge than by his acts in matters outside the scope of his authority or employment. The knowledge of the agent to be notice to the principal must be that of an agent who has authority to deal for the principal in reference to the specific matter which the knowledge affects. As said by an eminent jurist in a well-reasoned and leading case on this subject:

“The rule which imputes to the principal the knowledge possessed by the agent applies only to cases where the knowledge is possessed by an agent within the scope of whose authority the subject-matter lies; in other words, the knowledge or notice must come to

an agent who has authority to deal in reference to those matters which the knowledge or notice affects. The facts of which the agent had notice must be within the scope of the agency, so that it becomes his duty to act upon them or communicate them to his principal. As it is the rule that whether the principal is bound by contracts entered into by the agent depends upon the nature and extent of the agency, so does the effect upon the principal of notice to the agent depend upon the same conditions. Hence, in order to determine whether the knowledge of the agent should be imputed to the principal, it becomes of primary importance to ascertain the exact scope and extent of the agency." *Trentor v. Pothen*, 46 Minn. 298, 49 N. W 129, 24 Am. St. 225.

See, also, *Atchison, T. & S. F. R. Co. v. Benton*, 42 Kan. 698, 22 Pac. 698; *Larzelere v. Starkweather*, 38 Mich. 96.

The evidence before us makes it plain that the agency of Baldwin for Morrison was extremely limited in its subject-matter. So far as the record shows, it extended no further than to advise Morrison of the existence and physical value of the chattels on which he was lending his money. Before he talked with Baldwin he had practically agreed to lend the money to Denny, whom he had known for some years. He had been injured in an accident and was confined to his home when Baldwin came to him with the chattel mortgage, and because of his injury he then told Baldwin, who had in prior years been attorney for him in other matters, in substance that he would take his estimate of the property and make the loan. While he admitted that Baldwin was his agent to that extent, it is clear that, throughout the whole transaction, Baldwin was really the attorney and agent for DeBeaumont and Denny and was serving them in his visit to Morrison. Denny's title to the chattels or his right to mortgage the same was a matter concerning which there is no evi-

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dence whatever that Morrison ever sought or received advice from Baldwin. That matter was wholly outside the scope of Baldwin's agency for Morrison, so far as any such agency was established by the evidence. The fact that Baldwin drew the chattel mortgage we regard as immaterial. He received no fee from Morrison for doing so, nor, in fact, for any other services in the premises. He received his compensation for all of his services from Denny or DeBeaumont. In any event, he was a mere scrivener in drawing the chattel mortgage. We are clearly of the opinion that, in view of the special and limited nature of Baldwin's agency for Morrison, Baldwin's knowledge of the insolvency and fraudulent purpose of DeBeaumont and of Denny's participation in that purpose cannot be imputed to Morrison.

But there is another reason potent in equity why Morrison cannot be affected with notice of Baldwin's knowledge of the covinous nature of the transaction as between DeBeaumont and Denny, whatever may have been the scope of Baldwin's agency for Morrison. Baldwin was agent and attorney for both Denny and DeBeaumont on the one hand and for Morrison on the other. If Morrison told the truth, Baldwin never advised him that DeBeaumont was insolvent and was about to go into voluntary bankruptcy, or that the transfers of his property to Denny were such as to be in fraud of DeBeaumont's creditors, or that such was the purpose of DeBeaumont and Denny. Obviously this knowledge was withheld from Morrison with the consent, or at least with the connivance, of both DeBeaumont and Denny. True, nobody so testified in terms, but the facts clearly raise that inference. The very fact that Morrison did not actually know of the fraudulent purpose of DeBeaumont and Denny, who were acting under the advice and direction of Baldwin

and who, as Baldwin knew, had to have the money from Morrison in order to carry out that purpose by securing Mrs. DeBeaumont's cooperation, makes the inference that Denny and DeBeaumont knew that the knowledge would be withheld by Baldwin from Morrison almost a certainty. At any rate, that was an inference which the trial court had the right to draw from the undisputed facts. In such a case, the concealment constitutes a fraud upon the party kept in ignorance, the agent himself being such an instrument in that fraud as, in the language of Mechem, above quoted, "to practically destroy the relation of agency." Mechem, after pointing out that the rule of imputed notice rests in the assumption that the agent will report to the principal every thing touching the subject-matter material to the principal's protection and interest, says:

"This presumption, however, it is said, will not prevail where it is certainly to be expected that the agent will not perform his duty, as where the agent, though nominally acting as such, is in reality acting in his own or another's interest, and adversely to that of his principal." 2 Mechem, Agency (2d ed.), page 1399, § 1815.

See, also, 2 Pomeroy, Equity Jurisprudence (3d ed.), § 674.

From whatever angle this transaction may be viewed, in the light of the evidence we are satisfied that Morrison had no actual knowledge of the fraudulent purpose of DeBeaumont and Denny, and that notice cannot be imputed to him from his limited employment of their attorney, Baldwin, in this transaction.

The judgment is affirmed.

WEBSTER, FULLERTON, MAIN, and PARKER, JJ., concur.

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[No. 14598. Department One. April 24, 1918.]

JOHN E. KLINE, *Appellant*, v. INDUSTRIAL INSURANCE
COMMISSION, *Respondent*.¹

MASTER AND SERVANT—INJURY TO SERVANT—COMPENSATION ACT—PERMANENT PARTIAL DISABILITY—CONCLUSIVENESS OF JUDGMENT. Under Rem. Code, § 6604-5, providing that compensation under the workmen's compensation act shall be made in a lump sum for "permanent partial disability," which is defined as the loss of certain members "or any other injury known in surgery to be permanent partial disability," the industrial insurance commission cannot, after a judgment of the superior court has determined that an injury to an employee suffering from hernia has resulted in "permanent partial disability," refuse to make compensation in a lump sum because of its promulgated rules regarding hernia, which required the injured employee to submit to an operation and take pay for loss of time only.

Appeal from an order of the superior court for King county, Frater, J., entered February 15, 1917, denying an application for an order compelling the industrial insurance commission to fix the amount of plaintiff's compensation for personal injuries. Reversed.

Geo. McKay, for appellant.

The Attorney General and *Howard Waterman*, *Assistant*, for respondent.

WEBSTER, J.—In November, 1913, appellant, John E. Kline, received an injury in the course of his employment for which he filed a claim with the industrial insurance commission. The claim was disallowed and he appealed to the superior court, alleging that he had suffered a rupture known and classified in surgery as a "permanent partial disability," which had caused "permanent partial disability," upon which issue was duly joined. After a trial upon the merits, the court made findings and conclusions to the effect that appel-

¹Reported in 172 Pac. 343.

lant, while engaged in an extra-hazardous employment within the scope of the workmen's compensation act, "suffered a rupture known and classified in surgery as a permanent partial disability, which has caused a permanent partial disability," upon which judgment was entered ordering respondent to determine and fix the compensation of appellant according to law. This judgment was never appealed from, but remains in full force and effect.

Respondent having failed to comply with the judgment, an application was thereafter made to the superior court for an order compelling respondent to proceed to fix the amount of appellant's compensation in a lump sum as provided by law. The affidavit in support of the application sets forth that appellant has offered to furnish respondent proof as to the extent of his injury, which proof respondent refused to receive, except as shown by the following letter:

"Mr. John E. Kline,
"3902 40th Ave., S. W.,
"Seattle, Washington.

"Subject: Re Claim No. 32617.

"Dear Sir:—Relative to the settlement of your claim with this department, you are advised that, since your disability has been determined to be a hernia, your case comes within the rules of the department governing settlements for hernia, i. e., that no payment for permanent disability will be made in case of hernia, but the department requires an operation to be had in these cases, which according to all medical advice renders the condition of the claimant as good if not better than it was prior to receiving the hernia. After an operation has been performed and we have been notified of the same, we pay compensation for time loss, beginning five days prior to the date of operation, continuing until claimant is able to resume a gainful occupation.

"You may, therefore, understand that, before any payment can be made to you, it will be necessary for you to undergo an operation, and when you have same

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done you should notify us and payments will be made as above stated.

“Respectfully yours,
“Industrial Insurance Commission
“by John M. Wilson, Chairman.”

For return to the show cause order issued by the court, respondent alleged:

“That, on December 7, 1914, the industrial insurance commission duly established and promulgated the following rules governing the administration of the workmen’s compensation act:

“ ‘Rule I.

“ ‘(a) There must be an accident resulting in hernia.

“ ‘(b) It must appear suddenly.

“ ‘(c) Be accompanied by pain.

“ ‘(d) Immediately follow an accident.

“ ‘(e) There must be proof that the hernia did not exist prior to the accident.

“ ‘Rule II.

“ ‘All hernia, inguinal or femoral, which are shown to come under rule I, while the workman is engaged in his usual occupation and in the course of his employment, shall be treated in a surgical manner by radical operation. If death results from such operation, the death claim shall be paid and considered as a result of the accident.

“ ‘On these cases, time loss only shall be paid, unless it is shown by special examination that they have a permanent partial disability resulting after the operation. If so, it will be estimated and paid. Time loss between the date of accident and the date of operation will not be allowed if longer than five days.

“ ‘Rule III.

“ ‘The hernia claimant whose case comes under rules 1 and 2, who persists in wearing a truss instead of being operated, puts himself in the same position as the man with the fractured leg who refuses surgical attention. The commission may order him before a competent anaesthetist to determine if he can safely take an anaesthetic. If so, he must be operated to receive his time loss during the recovery from operation.

If, however, it is shown that he has some chronic disease that renders it unsafe for him to take an anaesthetic, his disability will be estimated as a permanent partial disability and claim settled as such.'

"That the judgment in the above action made and entered on February 15, 1917, reads as follows:

" 'It is decreed that the defendant proceed to determine and fix the compensation of the plaintiff, according to law, and that it pay the sum of \$25 to George McKay, the attorney for the plaintiff.'

"That, pursuant to said judgment and pursuant to the rules above quoted on May 17, 1917, the defendant directed the plaintiff to submit to surgical treatment by radical operation, as appears in the letter set forth in plaintiff's affidavit for the order to show cause. That such surgical treatment is reasonably essential to the recovery of the plaintiff. That plaintiff has refused to submit to such surgical treatment, and that the commission has therefore suspended the compensation of the plaintiff."

From an order denying the application, this appeal is prosecuted.

Subdivision f of § 5, page 356, Laws of 1911 (Rem. Code, § 6604-5), provides:

"Permanent partial disability means the loss of either one foot, one leg, one hand, one arm, one eye, one or more fingers, one or more toes, any dislocation where ligaments are severed, or any other injury known in surgery to be permanent partial disability. For any permanent partial disability resulting from an injury, the workman shall receive compensation in a lump sum in an amount equal to the extent of the injury, to be decided in the first instance by the department, but not in any case to exceed the sum of \$1,500. The loss of one major arm at or above the elbow shall be deemed the maximum permanent partial disability. Compensation for any other permanent partial disability shall be in the proportion which the extent of such disability shall bear to the said maximum."

It will be seen that this statute, in defining permanent partial disability, after specifying certain disabili-

ities by name, concludes with the comprehensive definition "or any other injury known in surgery to be permanent partial disability." It further provides that, for an injury constituting such disability, the workman shall receive compensation in a "lump sum" in an amount equal to the extent of his injury, to be ascertained in the manner therein prescribed. As already noted, the superior court expressly found that appellant had suffered a rupture which is known and classified in surgery as a permanent partial disability, and which in appellant's case, in fact, caused permanent partial disability. The letter of respondent to appellant, hereinbefore quoted, is in effect a refusal on the part of the commission to recognize appellant's injury as a permanent partial disability, and also indicates its purpose not to award appellant's compensation in a lump sum. The first sentence in the letter states:

"Relative to the settlement of your claim with this department, you are advised that, since your disability has been determined to be a hernia, your case comes within the rules of the department governing settlements for hernia, *i. e.*, that no payment for permanent disability will be made in case of hernia, but the department requires an operation to be had in these cases, which, according to all medical advice, renders the condition of the claimant as good if not better than it was prior to receiving the hernia."

The fallacy of this position lies in assuming that the judgment of the superior court merely determined that appellant's injury constituted hernia. What the court actually found was that appellant's rupture, received in the course of his employment, was a permanent partial disability within the meaning of the workmen's compensation act, and as a result thereof appellant was permanently partially disabled, for which, under the provisions of the statute above set forth, he was en-

titled to compensation in a lump sum. This issue was squarely raised by the pleadings, and respondent cannot overthrow the judgment by invoking its own rules. The purpose of the procedure prescribed by the rules of the commission is to determine in a given case whether hernia constitutes a *permanent* partial disability or a *temporary* partial disability, a fact which, in this case, had already been determined by a valid judgment of a court having jurisdiction of both the subject-matter and the parties.

We are not called upon at this time to determine the extent of the commission's power to make rules for the purpose of ascertaining whether a particular injury constitutes permanent or temporary disability, nor whether the rules in question are reasonable or unreasonable. It is certain that, whatsoever authority it possesses in this respect, it cannot establish rules in direct conflict with the provisions of the act or defeat the mandate of a court of competent jurisdiction. It cannot provide for compensation in "payments" when the statute requires that the compensation shall be in gross; neither can it reverse the judgment of a court in an action to which it was a party by appealing to itself. When it was finally determined that appellant's injury constituted a permanent partial disability, the only course open to the commission was to proceed to fix the amount of the award in a lump sum against the accident fund. To sustain respondent's position would be to nullify a solemn judgment of a court of competent jurisdiction, as well as to repeal an express provision of the statute. To illustrate: Let it be supposed that appellant should submit to radical operation which would effect a complete and permanent cure, this would demonstrate that his injury was temporary and not permanent; and thus deprive him of the right to compensation in a lump sum as for perma-

nent partial disability established by the judgment. Moreover, respondent, by its letter, does not claim that the examination of or operation upon appellant would be for the purpose of enabling it to ascertain the extent of disability as the basis for fixing the amount of compensation due appellant as for permanent partial disability. Its purpose is to establish by the operation the fact that appellant's injury is temporary only.

In this connection we deem it proper to say that respondent, in the exercise of its discretion in fixing the amount of the award by comparing the extent of appellant's injury to the standard prescribed by the statute, may take into consideration competent medical advice as to the reasonable and probable effect of an operation upon the injury from which appellant has suffered. It may not, however, refuse or "suspend" compensation until the appellant submits to an operation. In any event, the award must be in a lump sum as provided by the statute.

The judgment will be reversed, and the cause remanded with instructions to the superior court to enter an order directing respondent forthwith to proceed to fix the amount of appellant's compensation in a lump sum as for permanent partial disability in accordance with the standard prescribed by the statute.

ELLIS, C. J., FULLERTON, PARKER, and MAIN, JJ.,
CONCUR.

[No. 14639. Department Two. April 24, 1918.]

MINNA DOMRESE, *Appellant*, v. THE CITY OF ROSLYN,
Respondent.¹

LIMITATION OF ACTIONS—DAMAGING PROPERTY FOR PUBLIC USE—WRONGFUL DIVERSION OF WATER BY CITY—ACTION ON IMPLIED CONTRACT. The riparian owner's continuing right to take water lawfully appropriated being a right so far incident to the land as to be a part of the land itself, a right of action against a city for wrongfully diverting the water for public purposes without making compensation is an action on an implied contract or liability, within Rem. Code, § 159, subd. 3, limiting the same to three years from the time when the right of action accrued.

Appeal from a judgment of the superior court for Kittitas county, Taylor, J., entered May 9, 1917, upon sustaining a demurrer to the complaint, dismissing an action in tort. Reversed.

Kern & Henton, for appellant.

Harry L. Brown and *E. E. Wager*, for respondent.

CHADWICK, J.—The facts in this case are partially stated in our opinion in the case of *Domrese v. Roslyn*, 89 Wash. 106, 154 Pac. 140.

Plaintiff makes further allegation of fact that, before the waters of Cedar creek, or Domrese creek, as it is called in this case, were diverted in whole or in part, plaintiff had put a part of her lands to crop and had used the waters of the stream to irrigate them, that her lands are dry and arid, and that crops cannot be grown or matured thereon without the use of water. This action was brought to recover compensation for the diversion of the water and for the right of way for the pipe line. The court held upon demurrer that the action was barred by the statute of limitations.

¹Reported in 172 Pac. 243.

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Opinion Per CHADWICK, J.

A municipality has a right to take of the waters of a stream for the purpose of supplying its inhabitants with water for domestic and other uses. But, like any other public agency, it cannot do so without condemning and making compensation for the loss of the use of the appropriated waters or the extinguishment of the riparian rights, *in toto* or *pro tanto*, of the affected owners. Rem. Code, §§ 8005, 8010-8.

A right to continue to take water lawfully appropriated, or to have water follow its accustomed flow—the riparian right—is a valuable right of property, and is so far incident to the land that it has been held to be a part of the land itself. *Rigney v. Tacoma Light & Water Co.*, 9 Wash. 576, 38 Pac. 147, 26 L. R. A. 425; *Judson v. Tide Water Lumber Co.*, 51 Wash. 164, 98 Pac. 377; *Still v. Palouse Irr. & Power Co.*, 64 Wash. 606, 117 Pac. 466.

This being so, the case falls squarely within the rule of *Aylmore v. Seattle*, 100 Wash. 515, 171 Pac. 659; see, also, *Jacobs v. Seattle*, 100 Wash. 524, 171 Pac. 662.

Upon the authority of these cases, the judgment of the lower court is reversed, and the cause remanded with instructions to overrule the demurrer and have further proceedings.

ELLIS, C. J., FULLERTON, MOUNT, and HOLCOMB, JJ.,
concur.

[No. 14024. *En Banc*. April 25, 1918.]

HORATIO BRUENN, *by his Guardian etc., Respondent*,
v. NORTH YAKIMA SCHOOL DISTRICT NO. 7,
Appellant.¹

TRIAL—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE—PLEADING. Contributory negligence need not be submitted to the jury where it was not pleaded as a defense.

EVIDENCE—CONCLUSION OF WITNESS. An offer to show by an experienced teacher that a teeter board was not in itself a dangerous instrumentality is properly excluded as a conclusion of the witness.

APPEAL—REVIEW—HARMLESS ERROR—EXCLUSION OF EVIDENCE. Error cannot be predicated upon excluding testimony tending to show that a teeter board was not in itself a dangerous instrumentality, where the court by its instructions eliminated that question and submitted the case only upon the question of failure or inadequacy of supervision.

SCHOOLS AND SCHOOL DISTRICTS—INJURY TO CHILD ON PLAY GROUNDS—NEGLIGENCE—EVIDENCE—SUFFICIENCY. Recovery against a school district for injuries to a child playing on a teeter board on the school grounds, on the ground of negligence in supervision, is sustained where there was evidence that the teeter board was removed from its original position and dangerously used in a swing, and that the teacher in supervision on the grounds either permitted such removal or failed to observe and prevent it.

STATUTES—CONSTRUCTION—RETROACTIVE EFFECT. Laws 1917, p. 332, § 1, providing that no action shall be "brought or maintained" against a school district for non-contractual acts or omissions of officers or employees relating to play grounds owned or operated by the district does not apply to an action which had gone to judgment against the school district prior to the taking effect of the law in June, 1917, notwithstanding the pendency of an appeal by the defendant at that time; since the prevailing party is not "maintaining" an action by appearing and resisting the appeal.

DAMAGES—EXCESSIVE VERDICT. A verdict for \$5,000 for personal injuries sustained by a boy seven or eight years of age, is not excessive where his ankle was injured, he suffered much pain and underwent a number of operations, and his leg was permanently shortened and injured.

¹Reported in 172 Pac. 569.

Appeal from a judgment of the superior court for Yakima county, Preble, J., entered June 3, 1916, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a minor while playing on public school playgrounds. Affirmed.

Harold B. Gilbert, N. K. Buck, and John F. Chesterley (McAulay & Meigs, of counsel), for appellant.

Guy O. Shumate, for respondent.

MAIN, J.—Action to recover damages for injuries claimed to have been sustained while the minor plaintiff was at play on the public school playground. Verdict and judgment for plaintiff in the sum of \$5,000.

The injury to the minor plaintiff is alleged to have taken place in November, 1914, the minor plaintiff at that time being between seven and eight years of age. It is alleged that, just prior to one o'clock on the day of the injury, some of the small boys had taken a teeter board from its own upright and placed it across a swing, upon which the plaintiff and a number of other small boys seated themselves and began to teeter. Shortly after engaging in this form of play, the school bell rang, when the boys on the opposite side of the teeter suddenly sprang from it, permitting the side on which the minor plaintiff sat to rapidly descend, striking him upon the ankle and causing the injury complained of. The ground of negligence complained of, and upon which the verdict seems to have rested, was either lack or inadequacy of supervision. We shall notice the errors in the order in which they have been presented.

First, it is claimed that the court committed error in refusing to instruct the jury upon contributory negligence. This assignment is based upon the evidence of the boy that, while sitting upon the board, he had

his legs crossed beneath him, it being maintained by appellant that the crossing of the boy's legs was the proximate cause of the injury, and that such evidence was sufficient to take the question of contributory negligence to the jury. The court below refused to so charge upon the ground that contributory negligence was not pleaded. It is true that, in a number of cases, we have held that, while contributory negligence was an affirmative defense and to be proved as any other affirmative defense by the party pleading it, such defense might be established by the testimony of the plaintiff upon either direct or cross-examination. This, however, is a rule of proof and not a rule of pleading. It was not incumbent on the lower court in charging the jury to submit to them any issue not within the pleading. For this reason, refusal to submit such issue cannot be held error.

The second error is claimed on the exclusion of testimony. Appellant called a teacher of long experience in school playgrounds and offered to show that a teeter board constructed as the one upon this playground was not in itself a dangerous instrumentality, and that the school district was in the exercise of reasonable care in providing apparatus of this character. The offer was denied. The second part of the offer was clearly inadmissible, calling for a conclusion to be reached by the jury and not by any witness. The first part, while a question of fact, was not material to the issue submitted to the jury. The instructions are not included in the record sent up. The lower court, however, in passing upon appellant's offer, announced that he would eliminate the question of the original construction of the teeter board from the jury and submit to them only the question of failure or inadequacy of supervision. If the court so instructed the jury, and, since there is no contention to the contrary, we will as-

sume it did, the denial of the offer as not within the issue of negligence to be submitted was not error.

Third, the verdict is said to be contrary to the evidence. The evidence supporting the verdict is very weak. The weight of the testimony, in our judgment, is to the effect that the boy was not injured at the time or place claimed, but was injured during the forenoon recess while playing upon the teeter board when in its regular position. That, however, is not for us to decide. The jury has decided otherwise and the lower court has denied a new trial. We must, therefore, accept the fact as found by the verdict that the injury occurred in the manner and at the place testified to by the boy. This assignment also necessitates a review of the evidence as to the supervision of the playground. The principal and two of the teachers testified to supervision of the playground on all days between 12:40 and 1 o'clock, which would include the time of the injury. No particular remembrance was had of the day of the accident, no complaint having been made at the time it is alleged to have occurred, testimony being to the effect that supervision was had on every day of the school year. The little boy, however, says he saw no teacher on the playground. This is negative testimony and of little value. If, as accepted by the jury, the accident occurred in the manner and at the time testified to by the little boy, and at the time, as contended by appellant, a teacher was present, then the jury might have found that the supervision was inadequate or negligent in permitting the boys to take the teeter board from its own upright and use it in connection with the swing. If the teacher knew it, it was negligence to permit it, and if she did not know it, it was negligence not to have observed it. For these reasons, this claim of error must be rejected.

This opinion, up to this point, was written by the late Judge Morris after the case was heard by the department to which it was first presented. Upon the hearing *En Banc*, the opinion, as above set forth, was adopted by the court.

The principal question presented upon the hearing *En Banc* was the effect which the act of the legislature (chapter 92, page 332, Laws of 1917) in 1917 had upon a judgment which had previously been rendered against a school district. That act consisted of one section, which is as follows:

"Section 1. No action shall be brought or maintained against any school district or its officers for any non-contractual acts or omission of such district, its agents, officers or employees, relating to any park, playground, or field house, athletic apparatus or appliance, or manual training equipment, whether situated in or about any school house or elsewhere, owned, operated or maintained by such school district."

The act was approved by the governor on March 12, 1917, and took effect during the month of June following. The judgment in this case was rendered on the 19th day of June, 1916, approximately one year prior to the time when the act became effective. There are three possible classes of actions to which the statute might apply: First, cases which had arisen but upon which no action had been instituted, or causes that might arise in the future; second, actions which had been instituted but had not gone to final judgment when the statute took effect; and third, actions in which a final judgment had been entered when the act became effective.

It is the contention of the appellant that the act applies to all three classes of actions. It is the contention of the respondent that the act does not apply to those actions in which a judgment had been previously

entered. The act provides that no action shall be "brought or maintained." By the use of the two words brought or maintained it was evidently the legislative intent that they should not be given a synonymous or equivalent meaning. Had the word "brought" not appeared in the statute, it may be that the word "maintained" could then be given the meaning as only preventing the institution of actions, and as not applying to those which had been previously begun. This was the view entertained by the supreme court of the state of Maine in *Burbank v. Inhabitants of Auburn*, 31 Me. 590. The act which the court was considering in that case contained only the word "maintain," and it was held not to apply to actions which had been previously brought. The doctrine of that case, however, cannot be applied to the statute now before us. It is the duty of the court to ascertain, so far as it can, the meaning which the legislature intended to convey and give it effect. The word "brought" obviously applies to all actions which had not been instituted prior to the time the act took effect, whether the cause of action had arisen at that time or not. The question then arises whether the word "maintained" applies both to causes of action which had been previously instituted but which had not gone to judgment, and to actions in which a final judgment had been entered at the time the act took effect. Retroactive statutes are generally regarded with disfavor, and where it does not clearly appear that such was the legislative intent, the court will not give the statute a retroactive effect where to do so would impair existing rights. *Moore v. Brownfield*, 7 Wash. 23, 34 Pac. 199; *In re Heilbron's Estate*, 14 Wash. 536, 45 Pac. 153, 35 L. R. A. 602.

In the case last cited it was said:

"To construe the statute therefore as retroactive would require us to hold that it impaired existing

rights and we ought not to incline to such a construction where it does not clearly appear that such was the legislative intention. Retroactive statutes are generally regarded with disfavor and we think that the act under consideration must be construed as prospective only.

"In Sutherland on Statutory Construction, § 464, the learned author says:

" 'A statute should not receive such construction as to make it impair existing rights, create new obligations, impose new duties in respect of past transactions, unless such plainly appear to be the intention of the legislature. In the absence of such plain expression of design, it should be construed as prospective only, although *its words are broad enough in their literal extent to comprehend existing cases.*' "

At the time the above-mentioned act was passed, the respondent had an existing right in the judgment which had previously been obtained against the school district. As already pointed out, there is a class of actions to which the act could apply other than those in which a final judgment had been entered. There being a field in which the statute may operate without applying it to actions in which a judgment had already been entered, we think it was not the legislative intention that it should apply to the latter class of actions and thus destroy existing rights arising out of a final judgment.

But it is argued that, since the action was pending on appeal subsequent to the time when the statute took effect, the word "maintained" is applicable. This contention does not seem to us sound. When a person obtains a final judgment in the superior court, he has nothing further to do. He has obtained his judgment and is out of court. True, when the appeal is taken, notice must be given him, but this notice is not process and he is not required to appear in the appellate court. If he does not, no default can be taken against

him. It is the common practice for respondents to appear in this court and present their causes, and, from the court's standpoint, it is quite desirable that they should do so. But if they do not, no default is entered and the cause is considered upon its merits. In the case of *North Star Trading Co. v. Alaska-Yukon-Pacific Exposition*, 68 Wash. 457, 123 Pac. 605, the court had under consideration a statute which provided that no corporation should be permitted to "commence or maintain" an action without first alleging and proving that it had paid its annual license fee last due. It was there held that a corporation, even though it had not complied with the statute as to the payment of its license fee, could defend an action brought against it, and in so doing was not maintaining an action within the meaning of the statute. If to defend an action in the superior court, where, if no appearance has been made, a default may be taken, is not maintaining an action within the meaning of the statute, it would seem reasonably to follow that respondent, in this court, by appearing and resisting assignments of error, is not maintaining an action. The cause now before us was tried to a jury, and consequently is not tried here *de novo*. The appellant, by its assignments of error, claims that the trial court has committed errors of law. The respondent's position is that no errors were committed. The appellant has the affirmative of the argument, and the respondent the negative.

In *Glasser v. Hackett*, 37 Fla. 358, 20 South. 532, it was held that a writ of error, which corresponds to an appeal in this state, is in the nature of a new suit. In *Miller v. Union Mill Co.*, 45 Wash. 199, 88 Pac. 130, the court had under consideration the effect of the act of 1905 which repealed the factory act of 1903 upon causes of action which had arisen under the law of 1903 prior to its repeal. The law of 1903 required em-

ployers to safeguard dangerous machinery and deprived such employers of the defense of assumption of risk. It was there held that the repealing act did not operate retroactively, or affect causes of action that arose under the law of 1903 prior to its repeal. The case of *Ettor v. Tacoma*, 57 Wash. 50, 106 Pac. 478, 107 Pac. 1061; *Id.*, 228 U. S. 148, is distinguishable in two respects: First, in that case the action had not gone to judgment when the repealing act became effective; and second, the later act there was an act which repealed the prior act under which the action was being maintained. In the present case, as already pointed out, the action had gone to judgment long before the act took effect. In addition to this, the statute makes no reference to any previous statute, and it operates as a repealing act by implication only. As held in *Redfield v. School District No. 3*, 48 Wash. 85, 92 Pac. 770, and *Howard v. Tacoma School District No. 10*, 88 Wash. 167, 152 Pac. 1004, Ann. Cas. 1917D 792, a right of action existed against the school districts by virtue of §§ 950 and 951 of Rem. & Bal. Code. That statute is only repealed by the act of 1917 to the extent to which the two acts are necessarily inconsistent. Had the latter act expressly repealed the former, it may be that, under the doctrine of the *Ettor* case, *supra*, the action would be terminated at whatever point it was, even though pending on appeal. The case of *Haynes v. Seattle*, 87 Wash. 375, 151 Pac. 789, is distinguishable in this: There the statute applied to "pending" actions and was held to be applicable to an action pending on appeal. As already pointed out, while the present case was pending on appeal, the respondent, within the meaning of the statute, was not maintaining an action here. The case of *Spear v. Bremerton*, 95 Wash. 264, 163 Pac. 741, is, we think, not applicable to the present situation.

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Syllabus.

One other question remains, and that is whether the damages are excessive. The jury awarded a verdict of \$5,000, and after motion for new trial was overruled, judgment was entered for this sum. If the boy's present condition was proximately caused by negligence attributable to the appellant, as the jury had a right to find, then the verdict was not in such amount as to indicate passion or prejudice. The boy suffered much pain, underwent a number of operations, and was permanently injured. The leg that was injured will be shorter than the other and, the probabilities are, will not grow in proportion to the rest of the body.

The judgment will be affirmed.

ELLIS, C. J., PARKER, HOLCOMB, CHADWICK, and WEBSTER, JJ., concur.

[No. 14260. Department Two. April 25, 1918.]

RICHARD STANTON, *Appellant*, v. R. H. ZERCHER *et al.*,
Respondents.¹

FRAUD—SALES—RELIANCE ON REPRESENTATIONS. It is actionable deceit to induce the sale of a business by false representations as to the reputation and earnings of the business, and by exhibiting padded and falsified books and records misrepresenting and concealing the true condition and status of the business, since the purchasers may rely on such representations.

SAME—DECEIT IN SALE—GOOD WILL AND INCOME—MEASURE OF DAMAGES. In an action by way of counterclaim for damages for false representation in the sale of an insurance business and its good will, in which the evidence showed the falsity of the representations regarding the value of the good will as well as regarding the amount of the net earnings, the measure of damages was the difference between the net value of the business to the buyer, and the net value as it was represented, including the good will, properly defined as the faith of the public and the probability of the continuance of patronage, not as the business itself, but as part of the assets and personal property; and it is not error to include an in-

¹Reported in 172 Pac. 559.

struction as to the good will, notwithstanding testimony that the consideration for the sale was based upon figures as to the commissions which the books showed would be earned.

SAME. In such a case, the defrauded buyer is entitled to the highest measure of damages allowable under the law and facts, not exceeding the total unpaid consideration, including the good will, which was a calculable item under the facts, although not estimated in any given sum by any witness.

TRIAL—INSTRUCTIONS—CONSIDERED AS A WHOLE. Error cannot be predicated upon an instruction which might appear to be misleading, standing alone, where the jury were very fully and properly instructed as to all the issues in other instructions.

FRAUD—DECEIT IN SALE—ACTION FOR DAMAGES—INSTRUCTIONS. Upon an issue as to deceit in misrepresenting the net income of an insurance business sold to the defendant, in which there was evidence of deceit by padding books and of unlawful rebating and of the bad reputation of the plaintiff as an insurance agent, instructions thereon are proper as being within the issues.

SAME. Upon an issue as to deceit in misrepresenting the "net income" of a business sold to defendant, in which witnesses as to the income did not always use the word "net," instructions as to the "net income" are proper, since "income" would necessarily mean "net income" and not merely gross receipts.

SAME. Upon an issue as to deceit in misrepresenting the value of the good will and net earnings of an insurance business, sold to the defendant, in which there was evidence of false representations both as to the good will and earnings, from which damages were sustained, requested instructions on the theory that the value of the business was arrived at solely by determining the amount of commissions from a renewal of business on the books are properly refused.

Appeal from a judgment of the superior court for Benton county, Kauffman, J., entered January 5, 1917, upon the verdict of a jury rendered in favor of the defendants, in an action on promissory notes. Affirmed.

Moulton & Jeffrey, for appellant.

Hal. H. Cole, for respondents.

HOLCOMB, J.—This controversy arose over the purchase by the respondents from the appellant, on about August 18, 1914, of a certain insurance and loan busi-

ness in Kennewick, Washington, for a consideration of \$4,830, on which was paid the sum of \$2,000 cash at the time of the transaction, and notes aggregating \$2,830 were given for the remainder. Certain payments were thereafter made and credit given therefor, as a result of which the trial court instructed the jury that the amount of recovery upon the notes in principal totaled the sum of \$2,843.63, with interest thereon at twelve per cent per annum from June 7, 1916, the date of the commencement of the action, to the date of the submission to the jury, in case appellant recovered against respondents. The interest, as above specified, would have aggregated \$161.12, making the total recovery, in case appellant had recovered anything, \$3,004.75, principal and interest.

As an affirmative defense and by way of counterclaim to appellant's complaint, respondents alleged certain false and fraudulent representations made by appellant in negotiations leading up to the sale, as follows: That the business of appellant was an old established business; that there were no others in the field and no chance for them to come in; that the business had increased largely in volume during the year next prior to the transaction; that the values at which the various properties upon the books of appellant were insured were the correct insurable values; that his reputation as an insurance man, as well as the reputation of Stanton's Insurance Office, in Kennewick and vicinity was good, and that, in case the business was continued under the name of Stanton's Insurance Office, people would continue to do business with the office on account of the standing and reputation of Stanton, appellant advising respondents to continue the business under the name of Stanton's Insurance Office; that, in connection with the insurance business, he had been,

and then was, agent for the Pacific Building & Loan Association, which agency and business he would turn over to the respondents, and that he had been deriving from the insurance and loan business a total monthly net commission income of four or five hundred dollars; that the good will of the business was valuable, and that the appellant's standing and reputation, as well as the standing and reputation of the office, was good; that the insurance business, including the furniture and fixtures of the office and the good will of the business, together with the agency of the Pacific Building & Loan Association, was reasonably worth the sum of \$4,830. It is claimed that all the foregoing representations were false, and that appellant knew them to be false when made.

In addition to the foregoing, respondents claim that, after taking over the business, they discovered that the business had not been on the increase for the preceding year; that the reputation of the appellant was bad; that the business had not been earning the income of \$400 or \$500 per month, and that it had not been earning any income in excess of \$250 per month; that the books and records which had been exhibited to him by the appellant were padded and falsified, and that the true condition and status of the business had been concealed from the respondents; that the properties covered by insurance were insured beyond their actual valuation and in violation of the law; that the good will of the business was of little or no value; that the appellant had been paying and allowing commissions and rebates to various persons and corporations in order to secure business; that the agency of the Pacific Building & Loan Association had been discontinued, and that the insurance business was not worth to exceed the sum of \$1,830. Respondents further alleged that they relied upon the representations made to them concerning the

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business, believed the same to be true, would not have purchased the business had they known the same to be false, and that they were accordingly damaged in the sum of \$5,000.

All of the alleged fraudulent representations were denied by appellant in his reply.

The issues were submitted to the jury, and at the close of the trial, the court instructed the jury that appellant was entitled to recover on his notes, with interest at twelve per cent per annum from June 7, 1916, as heretofore stated, and that, if the jury found the respondents were entitled to recover more than this amount, their verdict should be for respondents to the extent of such excess; that, if they found that respondents' damage exactly equaled the amount due appellant, their verdict should be for respondents, and if they found that the amount of respondents' damage, if any, was less than appellant was entitled to recover, their verdict should be for appellant for the difference. The jury returned a verdict for the respondents; in other words, finding that the damage to respondents was exactly equal to the amount which appellant would otherwise be entitled to recover. Judgment thereon for costs was entered by the clerk against appellant.

In due time appellant filed his motion for judgment notwithstanding the verdict and for a new trial in the alternative, which motions were denied by the court, and a formal judgment dismissing appellant's action and allowing respondents their costs and disbursements was entered.

Twenty-eight errors are claimed by appellant, divided into nine groups. Under the allegations of respondents' affirmative answer that the representations made by appellant, if false, constituted actionable fraud and deceit and that respondents had the right to rely upon them, is well settled by the decisions of this

court. *Gilluly v. Hosford*, 45 Wash. 594, 88 Pac. 1027; *Blum v. Smith*, 66 Wash. 192, 119 Pac. 183; *Gillette v. Anderson*, 85 Wash. 81, 147 Pac. 634; *Christensen v. Koch*, 85 Wash. 472, 148 Pac. 585; *Duffy v. Blake*, 80 Wash. 643, 141 Pac. 1149; *Sowles v. Fleetwood*, 97 Wash. 166, 165 Pac. 1056.

Appellant's claims of error are so numerous, involved, and intricate that they cannot be separately discussed fully within the proper limits of this opinion.

One of the principal claims of error is that the question of good will of the business should not have been submitted to the jury. The court, as appellant says correctly, instructed the jury that the measure of respondents' damage, if any, was the difference between the value of the business which they actually got and the value it would have had had it been as represented, to wit, its purchase price, in this case \$4,330, the sum of \$500, which was given for office furniture and fixtures, not being in controversy.

To determine this difference it was, of course, necessary for the jury to determine the value of the business as it was when respondents received it, and for the purpose of guiding the jury along this line, the court gave, among others, instructions numbered 8 and 17. In instruction No. 8 they were told:

"Your first inquiry naturally will be: 'What was the thing which the plaintiff sold outside of the tangible personal property consisting of the furniture and fixtures?' To my mind, it was nothing more or less than the good will of the concern . . . I charge you that this is the law of this case. A learned English judge has said that by the term 'good will' is meant 'every advantage that has been acquired by the old concern by carrying on its business. Everything connected with or carrying with it the benefit of the business.' Tested by this definition, what did the defendants buy? In my opinion, they bought the reputation which the Stanton

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agency had built up in the community, its right to represent and solicit business for the companies which it had on its bills, its ability to earn commissions on renewals of insurance, its ability to earn commissions on new business to be acquired, and the probability that, by reason of its standing and reputation in the community that new business would come to the concern."

In No. 17 the jury were told:

"To sum up; if you believe from the evidence here that the plaintiff made any or all of these representations, that such representations or any of them are false, were known by him at the time to be false, or were not known by him at the time to be true, or that he suppressed the truth concerning any of these matters, of which it was his duty to speak, that the defendants relied upon the truth of these representations, either active or passive, and could not by reasonable diligence have ascertained their falsity, that as a result thereof they bought the business and that they paid therefor a sum in excess of the value of the good will of the business as I have defined it, then they have been damaged by the making of these representations and it will be your duty to ascertain and fix the sum of such damages."

Appellant complains that, because both appellant and respondents testified that the consideration for the sale was arrived at by ascertaining the amount which one renewal of the business then on the books would produce in the form of commissions, which was found to be \$4,330, all of the testimony and the instructions as to the good will were outside the issues and were no proper basis for the ascertainment of damages, and that no data were given the jury upon which to ascertain the value of the good will and the damage occasioned by the loss thereof.

Authorities are cited and quoted by appellant dealing with actions *ex contractu* to recover damages for breach of contract conveying good will where the vend-

or violated his contract not to engage in business for a definite period of time under the terms of the sale, to the effect that, while such damages are rarely susceptible of accurate proof, the measure generally expressed is the value of business lost to plaintiff; not the gain to defendant, which may be more or less than plaintiff's loss, though such gain may be considered in evidence. It should be shown to correspond, in whole or in part, with the loss of the plaintiff; nothing appearing of the amount of the plaintiff's loss, the allowance of damages beyond a nominal sum is error.

But here, while, by the terms of the instrument of conveyance given by appellant to respondents, appellant conveyed the good will of the business and agreed not to engage in any manner in the business thereby conveyed during a period of ten years from the date of the contract, in Kennewick or within a radius of forty miles thereof, this is not an action for the violation of that term of the contract, but is an action by way of counterclaim for the damages sustained by respondents by reason of the misrepresentations of appellant as to the value of the business at the time of the sale, including the value of the reputation and the good will of the business.

It was shown by competent evidence on behalf of respondents, which the jury evidently believed, and appellant and this court are concluded thereby, that the representations made by Stanton as to the good reputation of his insurance business, the income of the business for the year preceding, the amount of the business on the books which could and would be renewed, and the business on the books being clean good business, were all substantially false and untrue; that, on the contrary, the net earnings of the business for the preceding year had not been to exceed \$200 or \$250 per month, instead of \$400 or \$500 per month as represent-

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ed; that the reputation of Stanton's Insurance Office was not good but bad; that as such it was injurious rather than valuable; that the reputation of Stanton as an insurance agent was that of a rebater, and, therefore, a violator of the law; that, in fact, he had a pending contract with a concern from which he had purchased the business to give it and the officers and employees thereof rebates of from one-third to one-half of the commissions of all business, and, in some instances, the entire commission; that all these representations having been found untrue, the difference between the net value of the business to respondents and the net value of the business as represented was the thing upon which the jury had to base its verdict. In addition to that, it was entitled to allow to respondents a recovery of the value of the good will of the business as represented by appellant. Good will was correctly defined by the court in its instruction complained of, but the measure of damages was somewhat unduly restricted and narrowed against respondents.

"Good will" has been defined by the courts to be the faith which the manager of a business wins from the public and the probability that old customers will continue their patronage. *Chittenden v. Witbeck*, 50 Mich. 401, 15 N. W. 526; *Williams v. Farrend*, 88 Mich. 473, 50 N. W. 446, 14 L. R. A. 161. It comprises these advantages which may inure to the purchaser from holding himself out to the public as succeeding in an enterprise which had been conducted in the past with the name and repute of his predecessor. *Knoedler v. Boussod*, 47 Fed. 465. The good will of the business is not the business but is one result springing out of it. It would be too narrow to construe the word "business" to be the good will of the business. *McGowan v. Griffin*, 69 Vt. 168, 37 Atl. 298. The good will of the business is a species of personal property, and although inseparable

arable from business, is an appreciable part of the assets of a concern, both in fact and in the estimation of the courts. It is a portion of the subject-matter which produces profits. Story, Partnership, § 99; Lindley, Partnership, 842; *Morgan v. Perhamus*, 36 Ohio St. 517, 38 Am. Rep. 607. That it is property is abundantly settled by authority. See *v. Heppenheimer*, 69 N. J. Eq. 36, 61 Atl. 843.

It is evident that the good will alone could not be mathematically determined, nor could respondents or any other witnesses put a mathematical value upon it. It was to be a valuable asset which went along with the other assets of the business, and was a thing which was misrepresented by appellant, under the facts found by the jury, as much as any other thing was misrepresented. The damages claimed by respondents amounting to \$5,000 included the good will, and, in fact, the good will included almost everything transferred by appellant to respondents. It might possibly be said to include the renewals of insurance on the books, or represented by appellant to be on the books or existent. But certainly the good will of the business was something more than merely the amount of commissions on premiums and commissions on loans which might have been shown by appellant's books or in any way misrepresented as belonging to him, and therefore the aggregate damage sustained by respondents, which included the loss of good will of the business, might have been found by the jury, within the limits of the evidence and the allegations of respondents, in a sum considerably exceeding the difference between the value of the renewals of business as represented and actually and legally existing at the time of the sale.

The fraud in the sale being established to the satisfaction of the triers of the facts, the defrauded vendee would be entitled to the highest measure of damages

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allowable under the law and the facts. The jury, having resolved the facts in favor of recovery by respondents, allowed an exact offset of the amount of the unpaid purchase money and interest thereon as a counterclaim in damages, evidently basing the award upon the fifty per cent or sixty per cent of the business represented and not received, and the total good will of the business as represented and sold but not received. While this item of good will was not estimated in any given sum by any witness, it was a calculable item under the facts before the jury, although it could not exceed the total consideration, nor should it here exceed the amount thereof which respondents, having paid part, had yet to pay; in other words, the exact damages sustained.

The jury accordingly awarded exact compensation to respondents and substantial justice was done. We think the court did not err against appellant in giving the instructions complained of.

Complaints are made as to instructions numbered 6, 10, 15, 17 and 19. Instruction 6 told the jury that the burden of proof was upon the defendants to prove to the satisfaction of the jury their allegations as to misrepresentations by the greater weight of the evidence, and in case defendants failed so to prove their allegations, the verdict of the jury must be for the plaintiff in the full amount of his claim, *unless the jury found that false representations were made in other respects*. This instruction standing alone might appear to be misleading, but the court very fully instructed the jury as to all the issues of fact between the parties. Instructions numbered 10, 15, 17 and 19, complained of by appellant, relate to the reputation of appellant and his insurance office and business and padding of the books and rebating. There can be no doubt that the court correctly instructed the jury as to what

constituted rebating, and in so doing quoted the statutes of this state; and there can be no doubt that there was evidence and inference to be derived from evidence on the part of respondents that appellant was guilty of rebating under the definitions given, and also of padding his books. There was also proper and competent evidence of the bad reputation of appellant as an insurance agent, and his insurance office as an insurance business. These instructions applied to the facts in controversy and were in no sense improper or erroneous.

Appellant's assignments of error numbered 18, 19 and 20 relate to certain instructions given by the court which appellant asserts assume the existence of a state of facts never contended for by respondents, and which must have radically misled the jury. These complaints refer to a subdivision of instruction No. 4 and instructions numbered 12, 13 and 15. The specific errors alleged consist of the use of the words "net income" instead of "income." For instance, in subdivision C of instruction 4, the jury were told by the court "that the plaintiff represented the business which the concern had been doing had been increasing during each month of the prior year and the emoluments thereof in proportion, and that he was receiving from said business a *net income* of \$500." This instruction occurs in the statement by the court of the fraudulent misrepresentations alleged by respondents, and correctly states the allegations of respondents. In instruction No. 12, the jury were told that, if they found that the plaintiff represented the income of the concern had been increasing during each month of the year prior to the deal and that he was receiving from the business a monthly *net income* in the neighborhood of \$500; that the jury were satisfied that the income from the business had been either stationary or diminishing during

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such period and the plaintiff knew this, and that the defendants, by reasonable diligence, could not have ascertained the falsity of this statement and parted with something of value, by reason thereof and in reliance thereon, and were damaged thereby, they have a right to recover or set off in this case the amount of such damage. In instructions numbered 13 and 15 the allegations and theories of the respondents were again referred to as referring to the *net income* of the business or office instead of the gross receipts or gross income.

The allegations of respondents were that the *net income* for the preceding year and at the time of the sale were represented to be so much. Sometimes, in testifying upon the subject, respondents did not include the word "net" but spoke of the representation as to "income," and appellant accordingly claims that the testimony did not sustain the allegations as to representations of *net income* being so much per month, but would sustain the representations as to gross income only. "Income" is defined as that *gain* which proceeds from labor, business or property of any kind; the profits of labor, commerce, or business. 4 Words & Phrases, 3501. "Gain" signifies the difference between the receipts and expenditures. In the ordinary and popular meaning, where representation of "income" is made, one would necessarily understand that it meant the "net income." It would certainly not be taken to mean merely the gross receipts of a business or property. There was no fault, therefore, with the instructions referring to *net income*, nor was there any variance in the evidence of respondents referring to the "income" represented to them instead of the "net income" of the business.

Errors were assigned upon the refusal of the court to give instructions requested by appellant which, up-

on the theory of respondents, were inconsistent with those given by the court as to the method of determining the damages sustained by respondents, if any, and were based upon the theory that the value of the business was arrived at solely by determining the amount in the form of commissions which one renewal of the business then upon the books would produce. But since we have found that respondents sought to recover by way of counterclaim the value of the good will of the business and the difference between the value of the business as represented and its actual value, and that these were proper elements of damage, it is not necessary to discuss the refused instructions. They were improper and properly refused.

Other claims of error relate to the reception and rejection of testimony. We have examined these alleged errors and find no merit in any of them under the issues to be determined.

We find no error justifying reversal. Affirmed.

ELLIS, C. J., CHADWICK, and MOUNT, JJ., concur.

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[No. 14372. Department Two. April 25, 1918.]

J. W. ROBERTS, *Respondent*, v. JESS STILTNER *et al.*,
Appellants.¹

EVIDENCE—PAROL EVIDENCE TO VARY WRITING—EXPLAINING CONSIDERATION. Where a written contract for the sale of a quarter section of land acknowledged payment of \$2,700 in cash as part of the purchase price, it is admissible to show by parol evidence that the true consideration for the part payment was ten acres retained by the grantor and the discharge of certain liens, received as and in lieu of the \$2,700; as the same is not inconsistent with and does not vary the written contract of sale.

FRAUDULENT CONVEYANCES—KNOWLEDGE OF GRANTEE—EVIDENCE—SUFFICIENCY. In an action to quiet title to land, conveyed in fraud of rights under plaintiff's prior contract of purchase, the evidence supports findings that the grantee knew of the fraud, where it appears that he and the grantor were very intimate friends and their relations were such that he must have known of the existence of plaintiff's prior contract, and in no event paid over \$1,250 for land worth approximately \$5,000.

Appeal from a judgment of the superior court for Lewis county, Back, J., entered January 29, 1917, in favor of the plaintiff, in an action for specific performance, tried to the court. Affirmed.

John F. Dore and *Robert Welch* (*A. G. McBride*, of counsel), for appellants.

C. D. Cunningham, for respondent.

PARKER, J. — The plaintiff, Roberts, seeks specific performance of the following contract in so far as it obligates the defendants Stiltner and wife to convey to him the S. W. $\frac{1}{4}$ of section 24, in township 12, N. R. 5 E, in Lewis county, excepting ten acres described as the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of that section.

“Jan. 26, 1916.

“We, the undersigned agree to sell the following described property, to-wit: S $\frac{1}{2}$, S. W. $\frac{1}{4}$, E $\frac{1}{2}$ of N.

¹Reported in 172 Pac. 738.

W. $\frac{1}{4}$ and S. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ and lot 6 in section 24, T. 12, N. range 5 E. W. M. to J. W. Roberts for the following consideration, towit: \$5000 (Five Thousand).

"We the undersigned have received this day as part of the consideration the following: One team of horses, buggy and harness, valuation \$500, \$2,700 cash as part of the purchase price of said land.

"J. W. Roberts agrees to give to Anna Stiltner and her husband a first mortgage on said land for \$1,800 to be paid in two years, at eight per cent interest.

"J. W. Roberts agrees to pay back taxes and one mortgage to C. K. Walsh for \$140, with interest, and agrees to give a bill of sale on said horses. Jess Stiltner and wife agrees to give J. W. Roberts sixty days to full close the deal.

(Signed) Jess Stiltner,

"Anna Stiltner,

"J. W. Roberts."

A literal reading of this somewhat involved land description shows that it covers all the land here claimed by the plaintiff and more, that is, it covers the whole of the S. $\frac{1}{2}$ of the section and also land in the N. W. $\frac{1}{4}$ of the section. We note that lot 6 is the fractional N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of the section, containing slightly less than forty acres, according to the official plat of the United States government survey. The plaintiff also seeks the setting aside of a deed executed by the defendants Stiltner and wife to the defendant McLennan on February 10, 1916, purporting to convey the whole of the S. W. $\frac{1}{4}$ of the section. This deed, the plaintiff claims, was executed in fraud of his rights under the contract with the defendants Stiltners. Trial in the superior court for Lewis county resulted in a judgment and decree in substance as sought by the plaintiff, from which the defendants have appealed to this court.

At the time of the making of this contract, Stiltner and wife were the owners of the whole of the S. W. $\frac{1}{4}$ of the section and owned no other land or real prop-

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erty whatever. It is conceded by all concerned that, in so far as the contract describes land other than in the S. W. $\frac{1}{4}$ of the section, it did so because of the mutual mistake of all the parties. Respondent did not seek the reformation of the contract in a technical legal sense so as to exclude from the description land outside of the S. W. $\frac{1}{4}$ of the section, but conceded that he had no right to any land under the contract outside of the S. W. $\frac{1}{4}$ of the section. The trial court, however, by its decree, did in form, reform the contract in accordance with the admitted fact that the description was intended by all parties to be so limited. Respondent's disclaiming of the ten acres consisting of the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of the section was because, as he claims, of an agreement made between the parties, at the time of the making of the contract, that he would allow the Stiltners to retain this ten-acre tract on which their home buildings were situated, or that he would reconvey it to them upon the final consummation of the sale and the execution of the deed by them to him in compliance with the contract.

It is claimed by the respondent that the retaining of this ten-acre tract by the Stiltners and the payment of the \$140 mortgage and the back taxes by him was the real consideration of that part of the consideration stated in the contract to have been received as \$2,700 in cash by the Stiltners. This claim of respondent did not appear in his pleadings, he merely pleading the contract which showed that the \$2,700 had been paid. He plead, however, that he had paid the \$140 mortgage and the back taxes, and tendered the \$1,800 mortgage to be executed by him in final payment of the purchase price, all of which was done within the sixty-day limit prescribed in the contract. The fact that the \$2,700 had been paid in cash was denied by the Stilt-

ners and brought out by their counsel upon cross-examination of the respondent while upon the witness stand, and by the testimony of the Stiltners in their defense. It was in response to this showing that evidence was introduced by respondent thus explaining the consideration, in so far as the \$2,700 is concerned. The evidence, we think, clearly calls for the conclusion that this is the true meaning of the acknowledgment by the Stiltners in the contract of the payment of the \$2,700 in cash upon the purchase price.

It is contended by counsel for appellants that the trial court erred in admitting oral evidence in respondent's behalf in explanation of that part of the consideration acknowledged in the contract as having been received as \$2,700 in cash by the Stiltners. The argument is that this was the admission of oral evidence to vary and contradict the written terms of the contract and that it was, therefore, inadmissible. Now, if appellants can lawfully be permitted to show by oral evidence that the \$2,700 was not paid in cash, in contradiction of their solemn acknowledgment in the contract that it was so paid, it seems difficult to see why respondent may not also lawfully be permitted to show that the Stiltners did, nevertheless, receive property, or a promise that they might retain property already in their possession, agreed to be worth \$2,700 in lieu of the \$2,700 in cash. However, we think it is not the law that oral evidence explaining and showing the true consideration of the purchase price of land in a contract of this nature is inadmissible, either as varying the terms of the written contract or as being in contravention of the statute of frauds. In *Van Lehn v. Morse*, 16 Wash. 219, 47 Pac. 435, Judge Gordon, speaking for the court, quoted with approval from an opinion of Justice Sedgwick, speaking for the court in *Quarles v. Quarles*, 4 Mass. 680, as follows:

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“The principle is, I think, most clearly established, that when one consideration is expressed in a deed, any other consideration *consistent* with it may be averred and proved.”

This view of the law was adhered to by this court in *Don Yook v. Washington Mill Co.*, 16 Wash. 459, 47 Pac. 964, where oral evidence was held admissible for the purpose of showing that the actual consideration for the sale of the logs was different from that expressed in the bill of sale. In *Flynn v. Flynn*, 68 Mich. 20, 35 N. W. 817, the same view of the law is expressed, and it is there pointed out that such evidence is admissible apart from the question of reformation of the contract, Judge Campbell, speaking for the court, observing:

“The bill of complaint prays for a reformation of the deed, so as to express the true consideration; but this was unnecessary, as the true consideration may always be shown where it becomes material to do so, without reforming the deed.”

In the text of 17 Cyc. 653, we read:

“It is held by an uncounted multitude of authorities that the true consideration of a deed of conveyance may always be inquired into, and shown by parol evidence, for the obvious reason that a change in or contradiction of the expressed consideration does not affect in any manner the covenants of the grantor or grantee, and neither enlarges nor limits the grant.”

And on pages 655 and 661, the text and authorities cited in support thereof show that the rule is as applicable to contracts as to deeds, unless the statement of the manner of the payment of the consideration, or the part thereof in question, evidence an executory contractual obligation. Plainly the mere acknowledgment of the payment of the \$2,700 is in no sense an evidencing of any contractual obligation on the part of respondent, and as far as his obligation to pay the \$140

and the back taxes is concerned, the evidence clearly shows he performed those obligations within the time specified. Nor do we think the fact that the actual consideration, in so far as the \$2,700 is concerned, consisted in whole or in part of an agreement on the part of respondent to allow the Stiltners to retain the ten acres prevents the application of the rule of allowing oral evidence explaining the consideration in this case. They already had possession of these ten acres and the legal title thereto and, in its last analysis, the question of their retention of the ten acres under the oral arrangement had to do only with the question of the explanation of the expressed consideration, in so far as the acknowledged \$2,700 cash payment is concerned. We are of the opinion that the court did not commit error in admitting oral evidence explanatory of the expressed consideration in this respect.

It is contended in appellants' behalf that the trial court erred in holding that the deed of the whole of the S. W. $\frac{1}{4}$ of the section, executed by the Stiltners to McLennan, was made in fraud of the rights of respondent under the contract, in so far as they then conveyed the portion of the S. W. $\frac{1}{4}$ of the section other than the ten acres retained by the Stiltners. A careful review of the evidence convinces us that it is ample to support the conclusion reached by the trial court upon this question. The evidence, we think, warranted the conclusion that the whole of the S. W. $\frac{1}{4}$ of the section was worth approximately \$5,000; that the consideration paid by McLennan to the Stiltners therefor in no event exceeded \$1,250; that the Stiltners and McLennan were very intimate friends, and that their relations were such that McLennan must have known that there then existed this contract of sale for the land between the Stiltners and respondent. We note that McLennan did not testify upon the trial, though

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in the courtroom during the whole of the trial. We think it would be unprofitable to review the evidence here in detail upon this question. We conclude that the trial court correctly determined this question in favor of respondent.

The judgment and decree of the trial court is affirmed. While the decree determines the respective rights of the parties, it provides for the doing of certain things by the respective parties, such as making proper conveyances, executing the \$1,800 mortgage in proper form, and the payment of the sum of \$207.39 by respondent to McLennan in adjustment of a certain matter incident to the case which we have found it unnecessary to here notice, all to be done within ten days following the entry of the decree, to the end that it be made effectual. We conclude that such ten day limit, or such other further reasonable time as the trial court may determine, shall commence to run from the day of the filing of the remittitur in the superior court for Lewis county evidencing the judgment rendered by this court upon this decision. The cause is remanded to the trial court for such further proceedings looking to the rendering of the judgment and decree effectual as may be necessary, not inconsistent with our views herein expressed.

ELLIS, C. J., MOUNT, CHADWICK, and HOLCOMB, JJ.,
concur.

[No. 14405. Department Two. April 25, 1918.]

MARK J. SEVIER, *Appellant*, v. G. W. HOPKINS,
Respondent.¹

TRIAL—MOTION FOR DIRECTED VERDICT—WAIVER. Where both parties ask for a directed verdict and reserve no question of fact to be submitted to the jury, they admit that the evidence is free from conflict and waive the verdict of the jury.

SALES—WARRANTY—BREACH—MEASURE OF DAMAGES. Where hay to be chopped was sold under a warranty of first-class condition and the vendor caused wet hay and snow to be chopped and mixed with the good hay, whereby all was spoiled, the buyer, who had no notice of the fraud until after full payment, can recover his entire damage.

PRINCIPAL AND AGENT—DRAYMAN—SALES—ACCEPTANCE OF GOODS. A drayman, employed by telegraph by the buyer to haul hay and load it into cars, is not the agent of the buyer with authority to bind the buyer by the acceptance of hay that did not comply with the contract of purchase.

Appeal from a judgment of the superior court for Yakima county, Holden, J., entered March 31, 1917, in favor of the defendant, upon withdrawing the case from the jury, dismissing an action for damages. Reversed.

Snively & Bounds, for appellant.

D. H. Bonsted, for respondent.

HOLCOMB, J.—This action was brought by the appellant, Mark J. Sevier, against the respondent, G. W. Hopkins, for damages of \$437. The controversy arose out of a verbal contract for the sale of hay, and the facts are as follows:

In the latter part of February, 1915, the parties met in Toppenish, Washington, and respondent verbally offered to sell to the appellant some sixty-five to seventy tons of first-class alfalfa hay at \$6.50 per ton, and \$1.25 per ton additional for chopping the hay.

¹Reported in 172 Pac. 550.

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The hay was in stacks on the Britton place, about one-half mile from Toppenish. It was to be weighed on the Farmers' Union scales at Toppenish, and was to be hauled away from the chopper by appellant. On the day of this offer, the appellant went to Portland, Oregon, and told respondent that he would wire him if he would take the hay. On the next day appellant wired from Portland, "I will take the hay; have it chopped fine at once." The respondent had the hay chopped by one Hake, who then had his machine on the Britton place. Hake started to work and commenced stripping the hay by removing the snow and wet hay on the outside of the stack, whereupon respondent's son and foreman appeared and directed Hake not to strip the hay, but to cut it all and mix the wet hay and snow with the rest of the hay. Appellant wired one Bratton to haul the hay, who got Johnson Brothers, draymen, to haul it and load it into cars, to be shipped to Portland, Oregon. Appellant inspected the hay for the first time when it arrived in cars at Portland, and found that it had been heated or burnt, and that steam and water drops were in the car as though it had rained on the cars and leaked through. Appellant thereupon made a claim against the railroad company for damages. Thereafter he paid the respondent \$437, the price of the hay at \$6.50 per ton. The appellant learned that the railroad company removed the cars to Albany, Oregon, for inspection, and claimed that the railroad company was not at fault as at first contended. Appellant then went to Toppenish and investigated the matter there, and found that the wet hay and snow had been mixed while the hay was being chopped, upon orders of the respondent's son and foreman.

Appellant brought his action upon the theory that respondent had misrepresented the hay and that a

fraud had been practiced on him by mixing the wet hay and snow in with the rest of the hay, which fraud appellant had not discovered until after payment of the \$437. The evidence in the record shows that the hay was a total loss to appellant, and this is not disputed by respondent.

At the conclusion of the trial, the respective parties moved for a directed verdict. The court denied plaintiff's motion, took the case from the jury, and dismissed the action.

The trial court was of the opinion that the contract was a severable one and that the plaintiff tried it on that theory. The record does not show it, and the plaintiff claims otherwise in his brief.

Appellant assigns as error failure of the court to direct a verdict for the plaintiff at the conclusion of all the testimony. The evidence shows that the hay was to be in first-class condition, finely cut, and that the appellant never saw the hay until it reached Portland, from where his order of acceptance was sent by telegram before the hay was chopped and shipped. Respondent was in entire charge of the hay until after chopping. If all the hay had been in first-class condition before chopping, or if the wet hay and snow had been separated from the good hay, the condition of which the respondent had knowledge, the hay would not have spoiled in transit.

"It is generally held in this country that the intentional nondisclosure of a latent defect by the seller, when he knows that it is unknown to the buyer, is fraudulent." 35 Cyc. 69.

"Any device, however, used by the seller to conceal defects or to induce the buyer to omit inquiry or examination is as much a fraud as active concealment." 35 Cyc. 69.

"According to the weight of authority the buyer cannot, in the absence of fraud or an agreement giving

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him the right, rescind an executed contract of sale for a breach of warranty, his remedy in such case being on the warranty. The breach of warranty neither rescinds the sale nor gives the vendee a right to rescind, but merely a right of action for damages." 35 Cyc. 138.

It seems that there is some question as to whether the contract herein is severable. The decision of this point is unnecessary, as the appellant is not asking for a rescission but has brought his action for damages caused by respondent's misrepresentation and fraud.

This brings us to the point whether the appellant's evidence will sustain a judgment. Both parties having asked for a directed verdict and reserving no question of fact to be submitted to the jury, they admitted that the evidence was free from conflict. *Lindquist v. Northwestern Port Huron Co.*, 22 S. D. 298, 117 N. W. 365; *Knox v. Fuller*, 23 Wash. 34, 62 Pac. 131.

The *Knox* case was followed in the case of *Easterly v. Mills*, 54 Wash. 356, 103 Pac. 475, 28 L. R. A. (N. S.) 952, where the court said:

"When the two motions were interposed, there being no conflict in the evidence as to any material fact, the parties in effect waived a verdict of the jury, and submitted the cause for determination by the trial judge, who was then authorized to enter such judgment as the evidence warranted, and we will on this appeal dispose of the case on the same theory."

We cannot sustain the contention of respondent that the draymen had authority to accept, and did accept, delivery of the wet hay and snow as agent of appellant, thus constituting acceptance of the hay as delivered, by the purchaser. The authority of the draymen was simply to cart the hay turned over to them by the respondent to the cars. No one had been given such authority by appellant to act as his agent either to

accept or refuse the hay, no matter what its condition when delivered.

A wrong was committed in this case by the respondent's attempting to palm off upon appellant the wet unmerchantable hay, thus causing the whole lot to spoil, to appellant's damage. As to who committed this wrong, appellant had no knowledge until after payment and acceptance of the hay. To allow respondent to profit by his wrong would be unjust and unconscionable. The appellant was overreached and defrauded and is entitled to recover his entire damage therefor. This is indisputably shown to be the sum of \$437.

Reversed and remanded with instructions to enter judgment for appellant for the sum of \$437, with his costs and legal interest from date of trial.

ELLIS, C. J., FULLEBTON, MOUNT, and CHADWICK, JJ., concur.

[No. 14418. Department One. April 25, 1918.]

W. J. EASLEY *et al.*, Respondents, v. HENRY D. ELMER *et al.*, Appellants.¹

APPEAL—RECORD—EXHIBITS—REVIEW. Error cannot be predicated upon insufficiency of the evidence to sustain the verdict, where neither the instructions nor numerous exhibits introduced in evidence are made a part of the record on appeal.

Appeal from a judgment of the superior court for Pend Oreille county, Jackson, J., entered December 29, 1916, upon the verdict of a jury rendered in favor of the plaintiffs, in an action on contract. Affirmed.

M. F. Ryan, for appellants.

WEBSTER, J.—Plaintiff W. J. Easley, in his own right and as guardian *ad litem* for the minor respondents.

¹Reported in 172 Pac. 575.

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brought this action to recover the reasonable value of work and labor performed for the defendants at their special instance and request. For answer, the defendants alleged that the work for which recovery was sought had been performed under an express contract, by the terms of which certain work was to be done for the agreed sum of \$225, and that, without fault on their part, the plaintiffs had abandoned the contract before the completion of the work. By way of counterclaim, it was alleged that the plaintiff W. J. Easley was indebted to defendants for goods, wares and merchandise sold and delivered in the sum of \$155.27. In the reply the plaintiffs denied the express contract pleaded in the answer, and alleged payment in full of the account set up as a counterclaim. The cause was tried to a jury, resulting in a verdict in favor of the plaintiffs in the sum of \$240.75. From the judgment entered upon the verdict, the defendants appeal, assigning as error the insufficiency of the evidence to sustain the recovery.

The instructions of the trial court are not made a part of the record on this appeal. Numerous exhibits were introduced during the progress of the trial which, it may be inferred from the testimony, had important bearing upon the issues. These exhibits are not before us, neither are their contents copied into the record.

Under such circumstances it is impossible for this court to determine what issues were submitted to the jury or what was considered by it in arriving at the verdict. There is, however, competent evidence to sustain a recovery in the amount awarded. The judgment is therefore affirmed.

ELLIS, C. J., FULLERTON, MAIN, and PARKER, JJ., concur.

[No. 14480. Department Two. April 25, 1918.]

THE STATE OF WASHINGTON, *on the Relation of Georgia O'Neil, Respondent*, v. WILL D. WALLACE, *Auditor of Whatcom County, Appellant*.¹

MANDAMUS—EXCUSE FOR NONCOMPLIANCE—SUBSEQUENT GARNISHMENT. A county auditor is not excused from complying with a writ of mandate directing the issuance and delivery of two certain warrants to the relator by the fact that, in a subsequent action, he had been garnisheed in an action against the relator and had answered that he held the warrants and could not make delivery by reason of the writ of garnishment.

SAME—EXCUSE FOR NONCOMPLIANCE—SUBSEQUENT INJUNCTION. In such a case, it is no excuse for failing to comply with the writ that, in a subsequent action, the same court had issued an injunction restraining him from doing the things commanded in the writ of mandamus; since there is no jurisdiction to grant an injunction to stay proceedings on a mandamus.

Appeal from an order of the superior court for Whatcom county, Pemberton, J., entered July 31, 1917, directing the defendant to countersign, register and deliver certain warrants to the relator, or be committed to jail until compliance therewith. Affirmed.

W. P. Brown and *Loomis Baldrey*, for appellant.

Brown, Peringer & Thomas, for respondent.

MOUNT, J.—This appeal is from an order of the lower court directing the appellant to countersign and register two certain warrants and deliver them to the relator forthwith or be committed to jail until he complies with the order of the court. This is the second appeal. When it was here before, it was dismissed because the term of office of the county auditor expired while the case was here on appeal. We were of the opinion that the county auditor could not be required

¹Reported in 172 Pac. 581.

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to countersign and register the warrants after his term of office had expired, and we remanded the case with directions to set aside the order of the court committing the former auditor. We stated in that opinion (96 Wash. 107, 164 Pac. 741):

“The judgment in the mandamus proceeding is in no way affected by this appeal, and respondent must be relegated to her rights thereunder as against the present auditor of Whatcom county.”

The facts leading up to the order complained of by this appeal are sufficiently stated in that opinion and need not be repeated here. After the remittitur went down, the present appellant also refused to countersign and register the warrants, and an order was issued requiring him to comply with the mandate of the court or show cause why he should not be punished for contempt. In answer to the show cause order, he alleged that, in the action of Seelye and wife against the respondent and others, an injunction was issued restraining him from countersigning, registering and delivering one of the warrants, and that he could not countersign, register and deliver that warrant without being in contempt of the injunction order. He also made answer to the effect that, in the case of Seelye against the respondent and others, a judgment for costs had been rendered against the relator, and that he had been served with a writ of garnishment and had answered that he had these warrants in his possession, and that, by reason of this writ of garnishment, he could not deliver either of the warrants. The trial court concluded that this answer was insufficient, and entered an order requiring him to forthwith countersign, register and deliver these warrants to the relator or be committed to jail until he complied with the order. This appeal followed.

We think it is plain that the writ of garnishment did not prevent the appellant from countersigning and registering the warrants. The court would, no doubt, protect the appellant by requiring delivery of the warrants to the clerk of the court, there to abide any valid judgment which any person had against the relator. So it is plain that the fact that a writ of garnishment was served upon him and that he had made answer thereto in nowise prevented the appellant from complying with the order of the court.

It is next contended that the court erred in requiring the appellant to countersign, register and deliver the warrants because of the injunction which was issued restraining the appellant from delivering the warrants. We think there is no merit in this contention. As will be seen by a reference to the facts upon the other appeal (96 Wash. 107, 164 Pac. 741), on July 31, 1914, more than a month after the peremptory writ of mandate was issued by the trial court, Seelye and wife commenced an action to restrain the appellant from countersigning and registering the warrants. After a time—the record in this case does not show when—the same court, presumably by another judge—the record does not show the fact in this regard—issued a permanent injunction restraining the appellant from countersigning, registering and delivering one of these warrants. It is argued by the appellant that, if he was required to obey the original mandate of the court to countersign, register and deliver these warrants, he would be in contempt of the order of injunction issued by the same court. We are satisfied such result does not follow. The rule is stated in 14 R. C. L., at page 406, as follows:

“It is held that there is no jurisdiction to grant an injunction to stay proceedings on a mandamus, or on an indictment, information or a writ of prohibition,

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and that therefore the enforcement by a court of law of an adjudication for contempt in disobeying a peremptory writ of mandamus, cannot be enjoined."

High, in his work on Extraordinary Legal Remedies (3d ed.), at § 23, on page 29, states the rule as follows:

"And the rule is well established that the writ will not be granted to compel the performance of an act which has been expressly forbidden by an injunction in the same court or in another court of competent jurisdiction, or whose performance would be in direct violation of an existing injunction, even though the person seeking relief by mandamus is not a party to the injunction suit. Courts will not compel parties to perform acts which would subject them to punishment, or which would put them in conflict with the order or writ of another court, nor will the court, in such cases, to which application is made for a mandamus, inquire into the propriety of the injunction. And when it appears by the record that the respondent is already enjoined in the same court from performing the act sought, and that the injunction suit will determine the question involved, a mandamus will not be granted. If, however, the court granting the mandamus has first acquired jurisdiction of the subject-matter, it will not permit its jurisdiction to be ousted by the subsequent granting of an injunction by another court, restraining the respondent from doing the act in question. And in such case the court granting the mandamus will exact obedience to its mandate, notwithstanding the granting of the injunction."

And in High on Injunctions (4th ed.), vol. 2, at § 1317, on page 1334, it is said:

"An injunction restraining a public officer from performing a particular act will not be allowed to have the effect of preventing the performance of the act, under a peremptory writ of *mandamus* previously granted by a court of competent jurisdiction. Thus, where a county judge is directed by a peremptory *mandamus* to issue county bonds in aid of a subscription to a railway, a subsequent injunction restraining

him from issuing such bonds presents no obstacle to the enforcement of the *mandamus*. . . .”

“Courts will not ordinarily compel officers to put themselves in positive conflict with a writ or order of another court and will not interfere by *mandamus* with the obedience of an injunction issued by a court of competent jurisdiction, and it has been held that obedience to such an injunction will be a sufficient protection if the directions of the subsequent writ of *mandamus* are not obeyed in violation of the injunction. But an injunction restraining defendant from performing the command of a peremptory writ of *mandamus* will be no excuse for non-compliance with such writ; . . .” 26 Cyc. 497.

“Equity has no jurisdiction to grant an injunction to stay proceedings on a *mandamus* or a writ of prohibition, and the effect of a supersedeas cannot be controlled or destroyed by injunction.” 22 Cyc. 811.

To the same effect is High on Injunctions (4th ed.), vol. 1, § 68, page 86.

Merrill on *Mandamus*, § 312, page 375, states the rule as follows:

“A chancery court has no authority to enjoin further proceedings in an application for a *mandamus*. ‘The reason is, that a *mandamus* is not a writ remedial, but mandatory. It is vested in the king’s superior court of common law to compel the inferior courts to do something relative to the public. That court has a great latitude and discretion in cases of that kind; can judge of all the circumstances, and is not bound by such strict rules as in cases of common rights.’ It is said, that to allow such interference would interrupt the course of judicial proceedings, and lead to a conflict of jurisdiction, producing the greatest confusion, and tending to subvert the administration of justice. The court which first obtains jurisdiction in any matter will not be deterred from issuing a peremptory mandate therein, by the fact that another court, in proceedings subsequently begun, has issued an injunction restraining the parties from prosecuting the matter further.”

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It is plain from the record in this case that the injunction suit was brought to restrain the very act that the court by mandate had directed and ordered to be done. The injunctional order simply confused the appellant, and the writ of garnishment further confused him, so that he did not know what his duty was in the premises. Under the authorities above cited, which are not controverted by the appellant—and no authorities are cited to the contrary—it was the duty of the appellant to obey the original mandate of the court to countersign, register and deliver these warrants. The same court, and no other court, had jurisdiction to avoid that order except by proceeding in the original action. It was never appealed from; it became final and determined the whole matter; and neither the injunctional order nor the writ of garnishment had the effect to prevent the appellant from executing the mandate of the court.

The judgment appealed from is therefore affirmed.

ELLIS, C. J., and CHADWICK, J., concur.

[No. 14519. Department One. April 25, 1918.]

E. E. COLKETT, *as Receiver, etc., et al.*, *Appellants*, v.
A. W. HAMMOND, *Respondent*.¹

RECEIVERS—ACCOUNTING—EX PARTE ORDERS—VALIDITY. *Ex parte* orders, allowing fees and compensation to the receiver of an insolvent corporation and to his attorneys, and approving his final account upon tendering his resignation, entered without notice to any one but the receiver and his attorneys, are void.

APPEAL—DECISION—EX PARTE ORDERS—REMAND FOR FURTHER PROCEEDINGS. Upon reversing void orders allowing compensation to a receiver and his attorneys because made *ex parte*, the supreme court cannot determine the merits, but must remand the case for a hearing upon notice to the parties interested.

COSTS—ON APPEAL—UNNECESSARY RECORD. Where appellant brings up an unnecessarily voluminous record, he will be allowed costs for only a reasonable portion thereof.

Appeal from orders of the superior court for Pacific county, Edward H. Wright, J., entered January 6, 1917, approving the final account of a receiver and fixing his compensation and that of his attorneys. Reversed.

Robert G. Chambers and *Martin C. Welsh*, for appellants.

S. M. Lockerby and *F. D. Couden*, for respondent.

PARKER, J.—The Raymond Trust Company having become insolvent, the *Attorney General* commenced an action in the name of the state, in the superior court for Pacific county, which resulted in an order of that court being entered on October 6, 1914, appointing A. W. Hammond receiver of the company to take charge of its property and wind up its affairs. Hammond promptly qualified by taking his oath of office and giving bond as required by the order of appoint-

¹Reported in 172 Pac. 548.

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ment, and entered upon the discharge of his duties, continuing to administer the trust until January 6, 1917. What occurred in the receivership during that period is a long story which does not need to be told in detail here. It is sufficient for our present purposes to say that several reports were filed in court by Hammond, as receiver, and orders made by the court approving expenses incurred by and payments made to the receiver himself towards his compensation for services as such. These orders, in so far as they relate to the compensation of Hammond and his attorneys, were all made *ex parte* without notice to any of the other interested parties.

On January 6, 1917, Hammond tendered to the court his resignation as receiver, filing therewith an account of his doings as receiver up to that date. Without notice to, or opportunity given to any one interested, other than Hammond and his attorneys, to be heard thereon, the court entered orders purporting to finally approve this account; purporting to finally determine the amount of Hammond's compensation as receiver; purporting to finally determine the amount of compensation of his attorneys rendering services in the receivership; and accepting the resignation of Hammond as receiver. It so happened that the term of office of the presiding judge of the superior court for Pacific county expired very soon after the entering of these orders, when his newly elected successor became the duly qualified and acting judge of that court. Thereafter, on January 9, 1917, the new judge presiding, the court appointed E. E. Colkett as receiver to succeed Hammond. Thereafter Colkett promptly qualified as such, and has ever since been the duly qualified and acting receiver of the company, in charge of its property and affairs. On January 20, 1917, on appli-

cation of Colkett, as receiver, an order was entered by the superior court permitting him, as receiver, to appeal from all of the *ex parte* orders above noticed entered by the court on January 6, 1917, other than the order accepting the resignation of Hammond as receiver, and thereafter Colkett, as receiver, duly appealed to this court from each of those orders.

It is contended in appellant's behalf, in substance, that the orders appealed from, purporting to be final orders approving Hammond's final account as receiver, determining his compensation as receiver and that of his attorneys, are void and should be set aside because entered *ex parte* and without notice to any one interested, other than the receiver and his attorneys. We see no escape from sustaining this contention.

In the early case of *Tompson v. Huron Lumber Co.*, 5 Wash. 527, 32 Pac. 536, it was held that the determination of a receiver's compensation up to a given date, though the trust was then only partially administered, when such determination was made upon notice to those interested, became final and appeal would lie therefrom as from any other judgment. This holding suggests the thought that no *ex parte* order, interlocutory or final in form, allowing a receiver compensation, in whole or in part, would be final or conclusive upon those interested in the trust property as creditors or distributees. These orders not only purport to be final determinations of the compensation of Hammond as receiver and his attorneys and a final approval of his account, but it was an appropriate time for the final determination of all those questions, since Hammond had resigned as receiver. It is apparent, therefore, that these orders were intended to be final determinations of those questions and were not made as mere interlocutory orders subject to review upon a future final hearing of those questions. The one

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thing which, in any event, calls for a reversal and setting aside of these orders is that they were entered *ex parte* and without notice to those interested. In *In re Sullivan's Estate*, 36 Wash. 217, 78 Pac. 945, wherein orders had been made by the superior court making partial allowance towards compensation of an administrator, but without notice, Judge Hadley, speaking for the court, said in part:

"It is the position of the applicants that the orders are void, as having been made without jurisdiction, for the reason that they were made entirely *ex parte* and without notice of any kind to persons interested as distributees of the estate. The principle involved seems to be so fundamental that citation of authorities is unnecessary. Indeed, the principle is not controverted by the respondents, but they assert that the orders are merely interlocutory, and are neither conclusive nor binding against the right of the distributees to be heard upon final settlement of the estate. The orders are, however, entered in the form of solemn judgments of the court. They show that testimony was heard; that the court made findings that the amounts were reasonable, and unqualifiedly commanded their payment. They bear no evidence that they were entered as mere interlocutory orders, subject to future review by the court upon a full hearing when all parties should be before it. . . . If an administrator shall pay money to himself for his own services pending the course of administration, without due hearing upon notice, he must do so at his peril, for the court can enter no orders or judgment that will protect him until the interested parties are before it, or until they have been properly notified. If the court assumes to act in an *ex parte* manner, it can amount to no more than a mere advisory act, and the administrator who pays money to himself in pursuance thereof must do so knowing that the matter cannot be finally and judicially determined until all interested persons are before the court, or until they have been duly notified. The same principle applies to payments made to the administrator's attorney."

Our decision in *In re Doane's Estate*, 64 Wash. 303, 116 Pac. 847, wherein is noticed the question of the finality of orders approving executors' and administrators' accounts upon notice, other than the final account, pending administration, is of interest in this connection. The authorities therein cited and reviewed seem to render it plain that the finality of such orders and their binding effect upon all persons interested depends upon such orders having been made after hearing upon due notice. This rule seems to us of equal force whether the order is made during the course of the administration or at the close of the administration of the trust, and whether in the administration of the estate of a deceased person or in a receivership of an insolvent corporation.

Counsel for appellant, in their brief, ask that we not only set aside and annul the orders appealed from, but also that we determine what compensation the receiver Hammond and his attorneys are entitled to, and also the question of the approval of Hammond's account as receiver, upon the merits, in the light of the record before us; while counsel for respondent ask that we review the case upon the merits and affirm the orders appealed from, or make orders of the same import, should we hold the orders void for want of notice. To so proceed would be, in effect, for this court to determine questions which have never been determined upon due notice by the superior court. This, we think, would be exercising original rather than appellate jurisdiction, and it is difficult to see how the decision of this court, so rendered upon this record, would be any more conclusive against those who were not given an opportunity to be heard in the superior court than the orders made by that court and here sought to be set aside. We are quite clear that we should not now proceed to determine these questions upon the merits,

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but that the orders appealed from should be reversed and set aside upon the ground that they were rendered *ex parte* and without notice to those entitled to be heard, and that the question of the amount of compensation Hammond, as receiver, and his attorneys are justly entitled to, and the question of the approval of his account, should be remanded to the trial court for its determination upon notice and the giving of those interested an opportunity to be heard thereon. It is so ordered, and the superior court is directed to proceed accordingly.

We note that appellant has brought here a voluminous record, a large part of which, it seems to us, is unnecessary to the determination of the only question which this court can rightfully determine. We conclude, therefore, that appellant shall recover costs against respondent Hammond in this court for one hundred pages of the transcript prepared at his instance by the clerk of the superior court, and that he shall not recover any costs for the preparation of the statement of facts or the abstract prepared by his counsel. He shall recover other costs as by statute provided.

ELLIS, C. J., FULLERTON, MAIN, and WEBSTER, JJ.,
concur.

[No. 14528. Department Two. April 25, 1918.]

HANNAH ROBINSON, *as Guardian etc., Appellant*, v.
KITTITAS COUNTY, *Respondent*.¹

TAXATION—RECOVERY OF ILLEGAL TAX—VOLUNTARY PAYMENT—MISTAKE OF LAW. Taxes upon Indian lands, levied by the county and voluntarily paid by the Indian's grantee under a mutual mistake of law and the belief that the lands were assessable for taxation, cannot be recovered back; since there was no ignorance or mistake of fact and the payment was voluntary.

Appeal from a judgment of the superior court for Kittitas county, Kauffman, J., entered October 29, 1914, upon sustaining a demurrer to the complaint, dismissing an action to recover taxes paid. Affirmed.

J. N. Streff, for appellant.

Arthur McGuire, for respondent.

FULLERTON, J.—The appellant, in her own right as widow of John Robinson, deceased, and as guardian of her minor son, began an action in the year 1914 to recover from respondent the sum of \$761.53, which had been paid as taxes on certain lands for the years 1904 to 1913, inclusive. The court sustained a demurrer to her complaint on the ground that it failed to state a cause of action. On the appellant's election to stand on the complaint and refusal to plead further, judgment was rendered dismissing the action.

The complaint shows that a homestead entry had been made on the lands by an Indian on May 10, 1881, under an act of Congress of 1862 as amended March 3, 1875. A final receiver's certificate was issued to the Indian on December 13, 1887, under the act of Congress of July 4, 1884, and patent issued to the Indian on January 25, 1892. The Indian was entitled to a

¹Reported in 172 Pac. 553.

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patent in accordance with the act of July 4, 1884, under which for a twenty-five year trust period the land was "non-alienable, non-assessable, nor subject to taxation by the state or county or other quasi municipality within whose limits said lands may be situated, and any attempt to alienate the same, or tax the same or levy or assess taxes against the same by any county, state, or quasi municipal division of the state is void, illegal and fraudulent, and wholly outside of the jurisdiction of any officers of municipal or civil division of any state." The patent issued by the executive officer of the United States was erroneously executed pursuant to the act of Congress of January 18, 1881, relating to transactions with Winnebago Indians of Wisconsin, and did not contain the provision of the act of 1884 exempting the land from taxation for a period of twenty-five years.

On May 23, 1903, the lands in controversy were deeded by the Indian to John Robinson, under whom the widow and minor son now claim as heirs. From and including the year 1904 to the year 1913, the respondent assessed and collected taxes thereon totaling the sum of \$761.53. It is further alleged that these taxes were illegally assessed, and that they were levied, collected, and paid by mutual mistake of the parties as to the ownership and title of the lands; that, prior to the conveyance of the land by the Indian, an attorney was consulted by John Robinson, and he was advised and believed that the Indian had title in fee and was competent to make good title; that the taxes were paid under the mistake and belief that title vested in the grantee; that respondent assessed and collected the taxes under the belief that they were legal and valid; that the mistake was not discovered until within three months before the institution of the action; and that a claim for refund of the moneys was presented to re-

spondent and rejected prior to the bringing of this action.

The question of legal title to the land is, in view of our opinion, immaterial, and the sole matter for determination is, what right of recovery has one who voluntarily pays taxes illegally assessed under mutual mistake of law of the taxpayer and the assessing officers. It will be observed that the complaint does not show any compulsion or duress in the collection of the tax, nor that it was paid under protest. There is no showing of fraud in the assessment and collection, other than a conclusion to that effect from the mere fact of a mistaken right of assessment.

In the recent case of *Childs v. Spokane County*, 100 Wash. 64, 170 Pac. 145, the governing principle in such cases is stated as follows:

“It is settled law that money paid in satisfaction of an illegal tax to a municipal corporation, acting under claim of right and without fraud, cannot, in the absence of a statute authorizing it, be recovered back, where the payment was not compelled by duress or coercion and there was no ignorance or mistake of fact on the part of the one making such payment;” citing *Pittock & Leadbetter Lumber Co. v. Skamania County*, 98 Wash. 145, 167 Pac. 108; *Phelps v. Tacoma*, 15 Wash. 367, 46 Pac. 400; *Dillon, Municipal Corporations* (5th ed.), § 1617.

The case of *Phelps v. Tacoma* holds that a taxpayer's mistake as to his title to land upon which he pays the taxes does not alter the character of the payment as a voluntary one. See, also, *Homestead Co. v. Valley Railroad*, 84 U. S. (17 Wall.) 153, 166; *Cooley, Taxation* (3d ed.), pp. 824, 1495.

Decisions of this court cited by appellant, where recovery was allowed because of overvaluation through the mistake of the assessor, are based on the assump-

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tion of constructive fraud by reason of that fact, and are not authority for the recovery of voluntary payments of taxes upon land which the party paying believed he owned.

The judgment is affirmed.

ELLIS, C. J., MOUNT, HOLCOMB, and CHADWICK, JJ.,
concur.

[No. 14562. Department One. April 25, 1918.]

THE STATE OF WASHINGTON, *Respondent*, v.
JAMES MURPHY, *Appellant*.¹

CRIMINAL LAW—APPEAL—REVIEW — OBJECTION NOT MADE BELOW.
Objection to the scope of the cross-examination of the accused cannot be raised for the first time on appeal.

SAME. The erroneous impeachment of the accused upon a collateral matter cannot be raised on appeal, in the absence of a proper objection thereto below.

CRIMINAL LAW—TRIAL—INSTRUCTIONS — GRADE OR DEGREE OF OFFENSE. In a prosecution for arson in the first degree, in setting on fire in the nighttime a building in which there were one or more human beings, it is proper to refuse to instruct as to arson in the second degree when there was no evidence thereof.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered May 12, 1917, upon a trial and conviction of arson. Affirmed.

Thomas Byron MacMahon and *Tucker & Hyland*,
for appellant.

Alfred H. Lundin, *Everett C. Ellis*, and *Joseph A. Barto*, for respondent.

MAIN, J.—The defendant in this case was charged by information with the crime of arson in the first degree. The trial in the superior court resulted in a verdict of

¹Reported in 172 Pac. 544.

guilty as charged. A motion for new trial being made and overruled, the defendant appeals.

From the evidence in the case the jury had a right to believe that, about the hour of 10:30 o'clock on the night of August 17, 1916, the appellant was seen in front of pier 2, in Seattle, Washington. He was observed to throw something against a window in the front of the building. Immediately thereafter, the sound of crashing glass was heard and a flash of flame was seen. The building took fire, but before any great damage was done, this was extinguished. After throwing the missile, appellant started away at a rapid walk, and had proceeded but a short distance when he was called upon by a police officer to halt. After being summoned to halt, the appellant pulled a loaded revolver from his pocket and aimed it at the officer. After placing appellant under arrest, the officer caused him to proceed into the building into which the missile had been thrown, where the officer directed a person then in the building to telephone the fire and police departments of the city.

Upon the trial, no witness testified in behalf of the appellant except himself. His testimony was brief, consisting of only a few questions, in the course of which he denied throwing anything against, or doing any damage or injury in any way to, pier 2. The cross-examination of the appellant was somewhat extensive and covers a considerable range.

The first assignment of error is based on the claim that the court erred in permitting this cross-examination. In the answer brief of the respondent, it is stated that there was no objection in the lower court to such cross-examination. No reply brief has been filed, and the statement in the answering brief relative to there being no objection to the cross-examination has not been challenged. Notwithstanding this fact, we have

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searched the record diligently and find that the record contains no objection that the cross-examination was extending beyond its proper limits. This being the condition of the record, the question whether the cross-examination was too broad is not here for review. No objection having been made to it during the trial, the question cannot be raised for the first time on appeal. In *State v. Paysse*, 80 Wash. 603, 142 Pac. 3, the court considered the necessity of making objection to the introduction of evidence in the trial court, and it was there said:

“It is a principle, applicable to criminal as well as civil cases, that objections to evidence or matters or proceedings occurring at the trial, not going to the jurisdiction of the court, must be presented to and ruled upon by the trial court before they can be made available upon appeal.”

It is next claimed that the court erred in permitting the state to impeach the appellant upon a collateral or immaterial matter. Upon this question the record is in like condition as upon the previous question. No objection was made in the lower court upon the ground now asserted, which is that the impeachment was upon a collateral or immaterial matter. Like the first question considered, there being no proper objection, the question cannot be here reviewed.

The other assignments of error relate to the failure of the trial court to define in the instructions and submit to the jury the crime of arson in the second degree as well as the first degree. Had there been any evidence which would sustain a finding by the jury that the appellant was guilty of arson in the second degree, and had the court been requested to give such an instruction, it doubtless would have been proper to give it. Under the evidence in this case, however, the appellant was either guilty of arson in the first degree or

he was not guilty. The building was set on fire in the nighttime, and there was in the building at the time one or more human beings. The law does not warrant an instruction covering an included crime when there is no evidence to sustain it. *State v. Kruger*, 60 Wash. 542, 111 Pac. 769; *State v. Harsted*, 66 Wash. 158, 119 Pac. 24; *State v. Hart*, 79 Wash. 225, 140 Pac. 321; *State v. Reynolds*, 94 Wash. 270, 162 Pac. 358.

The judgment will be affirmed.

ELLIS, C. J., FULLERTON, PARKER, and WEBSTER, JJ.,
concur.

[No. 14573. Department Two. April 25, 1918.]

DAVID M. HOFFMAN, as *Executor etc.*, *Appellant*, v.
GOTTSTEIN INVESTMENT COMPANY, *Respondent*.¹

CORPORATIONS—CONTRACTS—ULTRA VIRES—PROMISSORY NOTE—CONSIDERATION. The payee who surrenders the personal note of the president of a corporation and takes in lieu the note of the corporation does so at his peril, as the act is *prima facie* unlawful and the note of the corporation without consideration.

SAME—CONTRACTS—ULTRA VIRES—WANT OF CONSIDERATION—ESTOPPEL—EVIDENCE—SUFFICIENCY. In such case, the evidence falls to show consideration and the corporation is not estopped to set up the illegality of the transaction, where it appears that the payee surrendered the president's personal note without indorsement and did not intend any sale or transfer to the corporation, and it was destroyed and never carried on the books of the corporation, and not brought to the knowledge of other trustees or stockholders, and the maker regarded the corporation note as his personal obligation the same as the other.

SAME. In such a case, an unexplained indorsement of interest on the corporation note, which was either paid by the president personally or by him from funds of the corporation, is not sufficient evidence of payment and ratification by the corporation, as the president could not ratify his own act when none of the other officers ever ratified it.

¹Reported in 172 Pac. 573.

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APPEAL—REVIEW—INVITED ERROR. Error cannot be assigned on the failure to strike out evidence as to transactions had with a party since deceased which was all brought out in direct response to questions propounded by counsel for appellant.

Appeal from a judgment of the superior court for King county, Alston, J., entered May 15, 1917, upon findings in favor of the defendant, in an action on a promissory note. Affirmed.

Kerr & McCord, for appellant.

Bausman & Oldham (*Walter L. Nossaman*, of counsel), for respondent.

PARKER, J.—The plaintiff Hoffman, as executor, seeks recovery upon a promissory note purporting to have been executed and delivered by the defendant investment company to Simon Wolff, now deceased. Trial in the superior court for King county resulted in findings and judgment in favor of the defendant, from which the plaintiff has appealed to this court. Recovery was denied by the trial court on the ground that the note was executed without consideration, and also that its execution was beyond the corporate powers of the defendant.

The note sued upon is for the principal sum of \$6,000. It was executed August 4, 1913, and made payable six months after date, with interest at six per cent per annum. Upon its back is the single indorsement as follows: "Aug. 6-15, interest paid in full to this date." This indorsement is not signed by any one, nor are we advised as to who made it. Some five years prior to the execution of this note, M. Gottstein borrowed of Simon Wolff the sum of \$6,000, evidencing the loan by the execution and delivery of a note for that sum. One or two years prior to the date of the execution of the note in question, respondent investment company was incorporated under the laws of this

state with a capital stock of \$300,000, divided into three thousand shares of \$100 each. The stock of the corporation was then owned as follows: M. Gottstein, 1,501 shares, Rosa Gottstein, his wife, 1,490 shares, Joseph Gottstein, his son, 4 shares, his daughter, 4 shares, and his niece, 1 share. Thereafter Rosa Gottstein died and her stock passed to the management and control of her executors. The record does not advise us as to who were all of the trustees of this corporation, but apparently M. Gottstein, as president, and Joseph Gottstein, as secretary, had the general management and control of the corporation.

About the 1st of August, 1913, Simon Wolff, who held the note against M. Gottstein, demanded of Gottstein that he cause to be executed and delivered to him (Wolff) a note of the corporation for \$6,000 in lieu of the personal note executed by Gottstein. Just what prompted this demand is not wholly certain, but apparently it was because of the organization of the corporation by the Gottstein family and the placing of most of the property of M. Gottstein in the corporation. It appears, however, that Gottstein had retained individually property of the approximate value of \$20,000. At the time of making the demand by Wolff for a note of the corporation in lieu of the personal note of Gottstein, he protested to Wolff that his personal note was good, and also that it was almost wholly paid. The Wolff and Gottstein families were related by marriage. While the two men had been apparently friendly theretofore, upon the making of this demand by Wolff they had a controversy evidencing considerable ill feeling, especially on the part of Wolff. Finally Gottstein yielded to the demand of Wolff and executed the note in the name of the corporation, which was signed by M. Gottstein as president of the company and Joseph Gottstein as its secretary. The circum-

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stances attending the demand for and the making of this note strongly suggest that it was made to conciliate Wolff more than anything else. The personal note of M. Gottstein was then delivered up to him by Wolff, and the testimony leads us to believe was then and there destroyed in the presence of Wolff, M. Gottstein and Joseph Gottstein. It is difficult to escape the conclusion that it was not the intention of Wolff to transfer or sell the Gottstein note to the corporation, but rather to simply have a note of the corporation in lieu thereof because of the family being the owners of most of its stock. We note that Wolff did not transfer the Gottstein note by indorsement or assignment in writing, but merely surrendered possession of it.

In the third finding made by the trial court we read:

“That there was and is no valuable or any other consideration for said note, and the defendant received no value whatever therefor; and the same is and was *ultra vires* of the corporation and is void, and the corporation is under no liability thereon.”

The latter part of this language may be regarded somewhat more as a conclusion of law than as a finding of fact. The first part of it, however, relative to receiving consideration by the corporation, we think is clearly a finding of fact and, we think, is amply supported by the evidence. The trial court, however, did, in its fourth finding, state as follows:

“That the said Simon Wolff delivered said original note of M. Gottstein to the M. Gottstein Investment Company, and the said M. Gottstein Investment Company received said note and executed in exchange therefor the note sued upon in this action.”

The third finding was excepted to by counsel for appellant, while the fourth finding was excepted to by counsel for respondent. We think the quoted portion of the fourth finding is not supported by the evidence,

and also that it is somewhat inconsistent with the third finding. We also note that, in the remarks made by the trial judge in his ruling upon the motion for a new trial, he seems to take this view and apparently looked upon the quoted portion of the fourth finding as not being wholly in accord with the evidence.

Looking to the record as a whole, we cannot escape the conclusion that this transaction was, in legal effect, nothing but an effort on the part of M. Gottstein to pay his own personal debt by the execution and delivery to Wolff of the note of the corporation in lieu of his personal note, and it seems to us equally plain that Wolff was bound to take notice of this as the legal effect of the transaction he then had with Gottstein. Our decision in *Mooney v. Mooney Co.*, 71 Wash. 258, 128 Pac. 225, seems to us decisive of this case in favor of respondent, investment company. On page 264 of that decision we quoted with approval from the language of the decision of the New York Court of Appeals in *Wilson v. Metropolitan Elev. R. Co.*, 120 N. Y. 145, 24 N. E. 384, 17 Am. St. 625, as follows:

“Undoubtedly the general rule is that one who receives from an officer of a corporation the notes or securities of such corporation, in payment of, or as security for, a personal debt of such officer, does so at his own peril. *Prima facie* the act is unlawful, and, unless actually authorized, the purchaser will be deemed to have taken them with notice of the rights of the corporation.”

It is contended in behalf of appellant that the respondent, investment company, did in law receive consideration of the new note by receiving the old one and, in any event, should now be held to be estopped from denying its liability upon the note in question, either upon the ground of want of consideration or want of power to execute it. We cannot agree with this contention. We think the evidence calls for the conclu-

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sion, that the private note of M. Gottstein, surrendered by Wolff upon receiving this note, was destroyed at that time; that Wolff, upon surrendering it, did not intend otherwise; that it was never carried upon the books or among the assets of the company as a part of its assets; that none of the trustees, other than M. Gottstein or Joseph Gottstein, even knew or suspected its existence as an asset of the corporation; that the note of the corporation here sued upon was never charged upon the books of the corporation as a liability of the corporation, and that no other trustees or stockholders of the corporation ever suspected its existence as a debt of the corporation. Indeed, the record suggests, when looked at as a whole, that M. Gottstein regarded this note as his personal obligation, as the first one was, even though he executed it in the name of the corporation.

Counsel for appellant seem to assume that the interest was paid upon this note by the corporation. We have noticed that the single indorsement on the back of the note fails to inform us who made it or as to who paid such interest. Even if that indorsement may be regarded as some evidence of the payment of interest, it may be said that, if the record shows the actual payment of any such interest, it was either paid by M. Gottstein personally or by him from the funds of the company. Manifestly he cannot ratify his own act, and it seems clear to us that none of the other officers or stockholders of the corporation have ever ratified the execution of this note in such manner as to estop the corporation from now denying its liability thereon.

Some contention is made in behalf of appellant that, in so far as the facts relating to the circumstances of the giving of this note and the surrender of the first

note of M. Gottstein at the same time were brought out by testimony of the conversation and transaction had with Wolff at the time, who is now deceased, such testimony comes from interested witnesses testifying in their own behalf against Wolff, now deceased, and therefore that such testimony is not admissible and, therefore, should not be considered. It seems plain to us from the record that all of this evidence was brought out in direct response to questions propounded by counsel for appellant and that they are not now in position to complain of the consideration of such evidence by the court. It is true they moved to have the principal part of it stricken after it had been adduced upon the trial, but they nevertheless voluntarily produced it. We think the trial court did not err in denying the motion to strike this testimony.

The judgment is affirmed.

ELLIS, C. J., CHADWICK, MOUNT, and HOLCOMB, JJ.,
concur.

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Statement of Case.

[No. 13844. Department One. April 26, 1918.]

LITTLE-WETSEL COMPANY, *Respondent*, v.W. A. LINCOLN *et al.*, *Appellants*.¹

WATERS AND WATER COURSES—IRRIGATION DITCHES—EASEMENTS—“OWNERSHIP.” When the title to an irrigation ditch originates in grant or prescription to use another’s land, it never rises above its source as an easement, and “ownership” of the ditch refers to ownership of the easement and not to title in fee.

SAME—IRRIGATION DITCHES—RIGHTS OF DOMINANT ESTATE. Where, at the time of granting an easement for an irrigation ditch, there was no contemplation of a greater servitude than the one specified, the owner of the dominant estate cannot increase the burden of the easement by turning other waters into the ditch without the consent of the owner of the servient estate.

SAME—IRRIGATION DITCHES—RIGHTS OF TENANTS IN COMMON. A tenant in common of the easement of an irrigation ditch has no right to enlarge the easement right by imposing the additional burden of carrying other waters not in contemplation of the parties at the inception of the grant, and neither has the right to deposit in the ditch private waters for his exclusive use; but the fact of cotenancy in the easement gives both parties the right to possession of waters in the ditch according to their respective proportionate interests.

SAME—IRRIGATION DITCHES—ACTIONS—JUDGMENT—CHANGING DIVERSION. Upon adjudging the rights of cotenants in an irrigation ditch, the court is not justified in changing the place and mode of diversion employed for a long time, merely because it would prove convenient to one of the parties in his use of a private ditch.

SAME—IRRIGATION DITCHES—DAMAGES FOR DIVERSION—RIGHTS OF COTENANTS. The wrongful commingling of his private waters, by one of the tenants in common of a joint ditch, without placing suitable measuring devices, forfeits his right to damages for diversion of part of the water by his cotenant.

Appeal from a judgment of the superior court for Okanogan county, Pendergast, J., entered May 3, 1916, in favor of the plaintiff, in an action for injunctive relief and for damages, tried to the court. Reversed.

• ¹Reported in 172 Pac. 746.

J. W. Faulkner and Neal & Neal, for appellants.

P. D. Smith and W. C. Gresham, for respondent.

FULLERTON, J.—The parties to this action are jointly interested in two ditches constructed across the lands of appellants for the purpose of irrigating their lands with water appropriated by the appellants and by the predecessors in interest of the respondent from the waters of Wolf creek, in Okanogan county, Washington. In one ditch, known as the Hess & Lincoln ditch, hereafter called the Hess ditch, both the parties own an equal interest; in the other, known as the Hess, Lincoln & Shulenbarger ditch, hereafter designated the Shulenbarger ditch, the respondent owns a two-thirds interest and the appellants a one-third interest. By means of flumes, water in the Hess ditch could be diverted into the Shulenbarger ditch. By means of another private ditch, the respondent deposited water appropriated by it from the Methow river in the Hess ditch near its head, and conducted such water through that ditch for use on respondent's lands when there was not sufficient water obtainable from Wolf creek. The appellants made use of this Methow river water on the assumption that they were entitled to one-half of any water in the Hess ditch and one-third of any water in the Shulenbarger ditch, while the respondent claimed sole ownership of all water from the Methow river placed by it in the Hess and Shulenbarger ditches up to the full capacity of its individual interest in such ditches, which was, respectively, one-half and two-up to the full capacity of its individual interest in such claim is that the respondent's interest in the ditches is not a mere easement but is one of full ownership as a tenant in common.

An action for injunctive relief and damages was brought by respondent, founded on allegations of un-

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lawful diversion of its water by the appellants and resulting damage to its growing crops, by reason of a shortage of water thereby occasioned, in the sum of \$326.25. The answer set up the decree in a prior action between appellants and the predecessors in interest of respondent, whereby it was adjudged that appellants were entitled to one-third of all waters flowing or to flow in the Shulenbarger ditch; that the Hess ditch is carrying a volume of water in excess of one-half its capacity by reason of the mingling of the Methow river and Wolf creek waters, and that the Shulenbarger ditch is carrying in excess of two-thirds of its capacity for a like reason; that the only right respondent has to deposit Methow river water in the ditches on the land of appellants is by virtue of an oral agreement that, in consideration of such privilege, the appellants were to have a right to the use of one-half of the Methow river water emptied into and conveyed through the Hess ditch; that the acts of respondent in carrying water from any source in the ditches in excess of its rightful proportion worked an injury to appellants to their damage in the sum of \$500; that respondent closed the headgates of the Lincoln ditch, thereby diverting all the water of Wolf creek through the Shulenbarger ditch, to appellants' damage in the sum of \$100; that the waters of Methow river and Wolf creek were commingled by respondent without the employment of any measuring devices to determine the amount conveyed by it from Methow river; that respondent interfered with the devices of appellants for diverting water to their laterals, to the injury of their crops in the sum of \$100, and that respondent, at the time appellants were harvesting their hay, turned water into the Shulenbarger ditch in excess of its carrying capacity, causing an overflow whereby their hay, cut and lying on the ground, was

damaged in the sum of \$50. On a trial to the court, judgment was rendered awarding respondent \$100 damages and appellants \$20 damages, and that each party pay one-half of the costs of the action; and further, that the respondent had the right to use the ditches for Methow river water to the full extent of their carrying capacity, provided there was no interference with appellants' right of enjoyment in such ditches. The portions of the decree specially excepted to are as follows:

"(1) That plaintiff and defendants are the owners, as tenants in common, of that certain irrigation ditch, taken out of Wolf creek, in Okanogan county, Washington, commonly known as the Hess, Lincoln and Shulenberg ditch, with an approximate carrying capacity of 5.76 C. F. per second of time.

"(2) That the interest of plaintiff in said ditch and all waters from Wolf creek flowing or to flow through the same is two-thirds, and the interest of defendants in and to said ditch and in and to all the waters flowing or to flow through said ditch from Wolf creek is one-third.

"(3) That the plaintiff and defendants are the owners, as tenants in common, share and share alike, of that certain other irrigation ditch taken out of Wolf creek, in Okanogan county, Washington, commonly known as the Hess and Lincoln ditch, with an approximate carrying capacity of 16 C. F. per second of time; and, after allowance has been made from Wolf creek for the carrying capacity of said Hess, Lincoln & Shulenberg ditch, the plaintiff and defendants are the owners, share and share alike, of all water flowing or to flow from said Wolf creek through said Hess & Lincoln ditch.

"(9) That the plaintiff has and shall have the right to use said Hess & Lincoln ditch to the extent of their full carrying capacity for the transportation of waters from the Methow river, provided that in so doing it does not interfere with the rights of the defendants to carry through said ditches, as herein decreed, their

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waters for the irrigation of their lands to the extent of their interest in said ditches as herein adjudged and decreed; and the defendants may use either or both of said ditches for the transportation of water for the irrigation of their lands to the full capacity of either or both of said ditches, provided, in so doing they do not interfere with the rights of plaintiff in said ditches, as herein adjudged and decreed.

“(15) That the claim for damages of plaintiff against defendants, by reason of the unlawful use by defendants of the waters of the Methow river, from July 18 to August 4, 1915, and of all the waters of Wolf creek from August 2 to September 20, 1915, to which plaintiff is entitled, be allowed to the extent of \$100.

“(17) That the plaintiff pay half of the legal costs and disbursements of this action, and defendants pay half of the legal costs and disbursements of this action.”

The appellants contend that the court erred in finding and decreeing that respondent has the right to use the Hess and the Shulenbarger ditches to the extent of their full carrying capacity for the transportation of waters from Methow river, and in failing to find that respondent has no right to use such ditches for that purpose except upon condition that appellants be entitled to use one-half of the Methow river water deposited in them. The issues presented and the finding of the court that the parties were tenants in common in the ditches raise the question whether the respondent had, in fact, any greater interest in the ditches than that of a mere right of easement.

It appears from the evidence that Hess, Lincoln and Shulenbarger were adjoining settlers upon government land, and had appropriated water from Wolf creek through a common ditch for the irrigation of their respective tracts. Dissension arising among them, Hess, in the year 1898, brought an action against Lincoln and

Shulenbarger for the purpose of establishing his rights in the ditch. The court decreed that this ditch located upon the lands of the three parties was:

“the property of plaintiffs and defendants equally, that is to say that said ditch and headgate as it now stands and exists is owned by plaintiff and defendants in the ratio of one-third to each of said parties, to wit: one-third to plaintiff and one-third each to defendants; and that the water now running therein or to run therein is and shall be the property of said parties in the same ratio as set out above relative to the ownership of said ditch, that is to say, that each of said parties shall have the exclusive right to take and use one-third of the water running in said ditch or to be run therein without molestation from either of the other owners of said ditch . . . and each of said parties are hereby enjoined from in any way molesting either of the other parties hereto in repairing said ditch and the uses of his said one-third of all water in said ditch or to be in the same by taking said water from the said ditch upon his said land in the usual way.”

A month after the foregoing decree was rendered, Hess and Lincoln entered into a contract to jointly build an additional ditch to the west of the Shulenbarger ditch and which was to replace an existing ditch belonging to Hess. The contract was as follows:

“Winthrop, Wash. Nov. 17th, 1898.

“Article of agreement entered into this day between W. A. Lincoln and Geo. W. Hess, both of Okanogan county, state of Washington, in which they agree to take out and construct a ditch for irrigation purposes from a stream known as Wolf creek. Head of said proposed ditch will be located on said stream about 60 rods west of the west line of the farm of W. A. Lincoln and the ditch will continue from the said head gates to and across the land of W. A. Lincoln on as high land as it is possible to run water, and parallel to a ditch owned by Geo. W. Hess, the said ditch being of no farther use or benefit to the said Geo. W. Hess, and by this article the said Hess agrees to abandon the

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same. The ditch in contemplation is to be constructed jointly and owned jointly by the said W. A. Lincoln & Geo. W. Hess. The said Geo. W. Hess in constructing the said ditch agrees to furnish team, plow & scraper, and the said W. A. Lincoln agrees to work single handed, furnishing his own tools in construction and continue the joint work as before stated until the said ditch is completed across the land of W. A. Lincoln. Then the labors and interest of Lincoln in said ditch ends. W. A. Lincoln waives all claim of right of way across his land, provided the said ditch is completed according to agreement. It is also agreed between Geo. W. Hess and W. A. Lincoln that, for the consideration of one dollar paid by W. A. Lincoln to Geo. W. Hess, that Geo. W. Hess will allow W. A. Lincoln the use of water from Lake creek to irrigate all the land now under cultivation between the ditch they contemplate building and the said Lake creek so long as Geo. W. Hess owns and controls the same.

“Witness

“J. P. Rader

W. A. Lincoln

“Geo. L. Thompson.

Geo. W. Hess.”

The respondent is the successor in interest to all the rights of Hess and Shulenbarger. It will be noted that there is nothing in either the foregoing decree or the contract which divests Lincoln of the title to any portion of his land and vests it in another. Joint ownership of an irrigation ditch does not necessarily constitute a title in fee. A right of way granted for ditch purposes has never been classed as other than an easement; and, usually, when in common parlance the term ownership is used in describing the interest of one in a ditch upon the land of another, it is understood as referring to the ownership of the easement. It is true one may have title to a ditch the same as to any other property, but when such title originates in grant or prescription to use another's land, such title never rises above its source as an easement.

A similar question as to what was meant by ownership of a ditch arose in the case of *Hoyt v. Hart*, 149 Cal. 722, 87 Pac. 569. The parties were litigating over their rights in an irrigation ditch, and, among other things, the plaintiff set up a prior judgment by which it was determined that the plaintiff was the owner of a ditch and waterway across the lands of the defendant for the purpose of conveying waters through said lands. An estoppel by judgment was asserted as precluding defendant from denying plaintiff's ownership, but the court held:

“In plaintiff's plea of former judgment the allegation is that it had been adjudicated that she was the owner of a ‘ditch and waterway’ across the lands of defendant for the purpose of conveying waters. In the foregoing discussion we have treated this allegation as meaning no more than that she owned an easement or right to carry waters over his lands through a ditch or waterway, and such we think is the proper construction of the language quoted.”

We think the same meaning inheres in the language used in the former judgment pleaded in this case which declares the Shulenburg ditch to be the property of plaintiff and defendants equally, as well as in that employed in the contract declaring that the Hess ditch was owned jointly by Lincoln and Hess. It is well settled that the owner of the dominant estate cannot enlarge or change his easement so as to impose any additional burden upon the servient estate. *White Bros. & Crum Co. v. Watson*, 64 Wash. 666, 117 Pac. 497, 44 L. R. A. (N. S.) 254; *Wiel, Water Rights* (3d ed.), § 502. At the time the rights of the dominant estate attached against the lands of appellants, there was not in contemplation of the parties a greater servitude than that growing out of the appropriation of the waters of Wolf creek. When the owner of the dominant es-

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tate sought to deposit in the ditches a quantity of water from another source he thereby increased the burden of the easement, which he was not entitled to do without the consent of the owner of the land, which, in this case, is neither alleged nor proved by the respondent. The appellants, it is true, alleged an agreement to allow the use of the ditches for the flow of the extra water in case they were permitted to withdraw it from the ditches for their own irrigation, but the evidence failed to establish such a contract.

Does the fact that appellants and respondent are tenants in common of the ditches and Wolf creek waters covered by their appropriation give one cotenant the right to deposit water in the common ditch in excess of his original easement? That the parties here are cotenants may be conceded. They claim their rights through the same original appropriation and from the same ditch. *Hough v. Porter*, 51 Ore. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728. And their rights are determined by the size of the ditch and the original appropriation, not by any subsequent diversion. *Hough v. Porter, supra*. But one difficulty in resting their rights on the principle of tenancy in common is that the facts upon which the rule is invoked to establish the right of one in the ditches would equally establish the right of both parties to any waters flowing or to flow in such ditches. All the dealings of the parties had relation to a joint user of both the ditches and the water. Accordingly, the introduction into the ditches by one cotenant of surplus water ought to inure to the benefit of all. The contract for the Hess ditch provided that Lincoln and Hess

“agree to take out and construct a ditch for irrigation purposes from a stream known as Wolf creek . . . The ditch in contemplation is to be constructed jointly and owned jointly . . . until the said ditch is com-

pleted across the land of W. A. Lincoln, then the labor and interest of Lincoln in said ditch ends.”

The judgment involving the Shulenbarger ditch decrees that such ditch is:

“the property of plaintiff and defendants equally . . . and that the water now running therein or to run therein is and shall be the property of said parties in the same ratio as set out above relative to the ownership of said ditch, that is to say, that each of said parties shall have the exclusive right to take and use one-third of the water running in said ditch or to be run therein without molestation from either of the other owners of the said ditch . . . and each of said parties are hereby enjoined from in any way molesting either of the other parties hereto in repairing said ditch and the use of his said one-third of all water in said ditch or to be in the same.”

The contract as to the Hess ditch provided for a joint appropriation of waters from Wolf creek. Hess, in return, abandoned a prior ditch and shifted his prior appropriation of Wolf creek waters to the new ditch, as is shown by evidence *aliunde* the contract.

The rights under irrigation ditches in arid regions have developed largely from the necessities of the case, and existing principles of law have usually been applied to meet the situation. But they have not always done so satisfactorily, and the decisions are apparently at cross purposes because they have sought to adjust themselves to the facts in the particular case before the court. One principle often asserted, however, is that a ditch over the land of another is nothing more than an easement. But the courts also recognize that there is a property right in such a ditch and a property right in the water, the ownership of which may be combined in one person in some cases, and, in other cases, that the ditch and the water may rest in separate ownership and either may be sold like any other property.

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Growing up with this doctrine, the right of tenancy in common in either the ditch or the water has been recognized. But we do not believe it was ever the intention to imply that such cotenancy was ever based upon a theory that the joint ownership rested upon any theory of ownership in fee. If the initiation of the right to convey water over the land of another originated as an easement, no subsequent user would convert the right into a stronger title. Grant that the easement is so far an interest in land as to render applicable the rules governing tenancy in common, the foundation for the whole superstructure of that character of title is the existence of the easement, and hence the principles of cotenancy are secondary to those applying to easements and must be construed in connection with the doctrines of easements. It is the rule that the owner of the dominant estate can make no larger use of his easement or change its character in any way so as to increase the burden on the servient estate. We think this rule in cases of easements is paramount to the rule that a cotenant may use the joint property to the full extent, if in so doing he interferes in no way with its enjoyment to like extent by the other joint tenant. The tenancy in common rule is afforded full scope by the user of the waters of Wolf creek, which was the only water involved when the title by cotenancy was initiated. But to say that the parties, who have a joint tenancy in the ditches for the use of Wolf creek waters, have such a character of ownership as will entitle them to impose an additional servitude on the servient estate would do violence to the law of easements in order to give the joint tenants more enlarged rights than were acquired at the inception of their title. The trial court finds that the appellants and respondent are tenants in common in the

ditch, and consequently that respondent had the right, when the ditch was short of water to which appellants were entitled, to deposit water therein from its private ditch and have the entire use of such added water to the exclusion of appellants. The court's finding that the parties are cotenants in the ditch would necessarily give both parties the same rights in the ditch, that is, each would have the right to the possession of all the property held in cotenancy according to their respective proportionate interests. This the decree does not afford, inasmuch as it awards respondent the right to introduce Methow river waters for its sole use, while it confines appellants to the waters of Wolf creek and does not even accord them an equal right to introduce waters from additional sources. In this we think the decree is erroneous.

But further than that, we think the court errs in not limiting the rights of the parties as tenants in common by the superior rules of easements applicable in this case, since the sole right of the respondent as a tenant in common is rested and founded upon its interest in the ditch as a mere easement. The respondent seeks to enlarge its easement right, not by grant, but by user adverse to appellants, a user which has not yet ripened into title by prescription. It seeks a use of the common property over and above any use accorded to the cotenant, which likewise imposes an additional burden on the property of appellants not in contemplation of the parties at the inception of the grant of easement rights. The added volume of water necessarily increases the deposit of silt in the ditch, subjects its banks to greater danger of overflow and of breakage, and naturally augments the amount of seepage on the lands of appellants. It is not a question of whether the added servitude may in any wise prove beneficial to the appellants.

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The appellants contend that the court erred in finding and decreeing that the appellants are the owners of one-half of the waters of Wolf creek flowing through the Hess ditch after allowance made for the full carrying capacity of Wolf creek waters in the Shulenburg ditch. The evident intent of this provision of the decree was to compel the appellants to carry as much as possible of the Wolf creek water to which they were entitled through one ditch, so as to leave greater capacity in the Hess ditch for the deposit of the Methow river waters. There is no warrant in the evidence nor in the law for such decree. A certain quantity of water had been appropriated from Wolf creek and diverted through two separate ditches over the land of appellants for the use of themselves and of the predecessors in interest of the respondent. There is no evidence justifying a change in the place and mode of diversion, except that it would prove convenient for the respondent because its private ditch deposited the waters of Methow river in the Hess ditch. We do not deem this a sufficient reason for altering the mode of diversion employed by the appellants for a long period of time.

The appellants contend that the allowance to respondent of \$100 damages for the use of water flowing in the ditches, which was due to respondent's deposit therein of Methow river water, was erroneous. The appellants were charged with using half of the river water claimed by respondent from July 18 to August 2, 1915, and with using all the water from Wolf creek between August 3 and September 20, 1915. The evidence shows that, by the act of respondent, the waters of Methow river were commingled in the ditches with the waters of Wolf creek without the placing of suitable measuring devices. Such commingling by the respondent, even if its right of separate ownership were not lost by the introduction of the water into ditches

jointly owned by the appellants, would forfeit respondent's right to damages for the use of the water. In regard to the Wolf creek water, the evidence shows that it was all used by the appellants between August 3 and September 20, 1915. The flow was not very large at that season, and in compensation the respondent had its river water flowing through appellants' ditches. The evidence of resulting loss to respondent through the use of all the Wolf creek water by appellants is not very satisfactory, but as the evidence was conflicting and the trial court was better situated to judge of the credibility of the witnesses, we are not disposed to disturb his finding that the respondent was damaged by the acts of appellants in the sum of \$100.

The decree of the lower court will be reversed, in so far as it grants the respondent the right to flow its Methow river waters through the ditches on the land of appellants, and in so far as it requires appellants to conduct as much as possible of their share of Wolf creek waters through the Shulenbarger ditch. The damages and costs awarded by the trial court will stand as adjudged. The appellants will recover their costs in this court.

ELLIS, C. J., PARKER, MAIN, and WEBSTER, JJ., concur.

[No. 14212. Department One. April 26, 1918.]

SCHWABACHER BROTHERS & COMPANY, INCORPORATED,
Appellant, v. ORIENT INSURANCE COMPANY,
Respondent.¹

INSURANCE—FIRE INSURANCE—ASSIGNMENT OF LOSS—KNOWLEDGE OF AGENT—LIABILITY OF COMPANY. Where the agent who solicited and wrote the insurance witnessed the assignment of the policy after the loss, and had full knowledge of the terms and conditions of the assignment, his knowledge is imputed to the company, although the agent failed to report the assignment; and the company is liable for paying out the loss in disregard of the rights of the assignee.

Appeal from a judgment of the superior court for King county, Hewen, J., entered April 19, 1917, upon findings in favor of the defendant, in an action on a fire insurance policy, tried to the court. Reversed.

Grinstead & Laube, for appellant.

H. T. Granger, for respondent.

MAIN, J.—The plaintiff, as assignee of W. C. Watson, brought this action to recover for the loss of property covered by a fire insurance policy issued by the defendant. The cause was tried to the court without a jury, and resulted in a judgment denying liability. From this judgment, the plaintiff appeals.

No bill of exceptions or statement of facts has been brought to this court. The question, therefore, is: What is the proper judgment under the facts as they appear in the findings of the trial court? These facts, so far as necessary to present the controlling question upon this appeal, may be stated as follows: The Orient Insurance Company, the respondent, is a corporation

Reported in 172 Pac. 568.

organized and existing under the laws of the state of Connecticut, and authorized to do business under and by virtue of the laws of this state. The policy-writing agent of the company in the city of Raymond was Edward E. Little. The agent, Little, insured in the name of the respondent company certain property belonging to W. C. Watson, at Raymond, Washington. While this property was thus insured, it was destroyed by fire. The insurance company admitted its liability under the policy in the sum of \$750, the full face value thereof. Soon after the loss occurred, Watson, the insured, for a valuable consideration, assigned all his rights under the policy to the appellant. This assignment was in writing and was witnessed by the agent who had solicited and written the policy. This agent had full knowledge of the terms and conditions under which the assignment was made. He did not, however, communicate this knowledge to the insurance company. After this assignment was executed and delivered, the insurance company sent its draft, payable to Watson, to its agent who had written the insurance, with direction to deliver the draft to Watson and secure the policy from him and return it to the office of the insurance company at San Francisco. When the draft was delivered, Watson surrendered the policy to the agent and indorsed the draft to him, and the agent subsequently used the money which he obtained from the draft in payment of certain creditors of Watson other than those who were provided for in the assignment to the appellant. The appellant, after learning that the assignment had been disregarded by the agent and Watson, brought an action against Watson and the insurance company. Apparently, judgment went against Watson by default, and the only parties here involved are the appellant, who claims under the

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assignment, and the respondent, the insurance company.

The controlling question, as we view it, is whether the knowledge of the agent, Little, that the assignment by Watson had been made to the appellant after the loss occurred is imputable to his principal, the insurance company. If knowledge of this agent was knowledge to the company, even though not disclosed to the company, the case was not correctly decided by the superior court. On the other hand, if the insurance company is not chargeable with the knowledge of its agent not actually disclosed to it, the judgment should be affirmed. We think the case of *Gaskill v. Northern Assurance Co.*, 73 Wash. 668, 132 Pac. 643, is controlling here. In that case the agent was a policy-writing agent, as here. He had sold the property covered by the policy and other property to A. W. Amick and wife. At this time the policy which was upon the property was canceled. The agent solicited the rewriting of the business on behalf of the defendant company. The business was all transacted through A. W. Amick, the husband. The agent knew that the property covered by the policy which he rewrote in the defendant company was the separate property of Mrs. Amick, but "unthinkingly" wrote it in the name of the husband, A. W. Amick. The policy was delivered and paid for. The loss occurred during the term of the policy, and the defendant denied liability. The only defense advanced was that the policy was invalid because it insured the property in question in the name of A. W. Amick, whereas it belonged to Nettie B. Amick, his wife. It was there said:

"The sufficiency of that defense rests upon the question whether the knowledge of the true ownership possessed by the agent bound the appellant (the insurance company), as principal, so as to make the agent's mis-

take the mistake of the appellant, of which it cannot take advantage.”

The question was there fully discussed, and in the course of the opinion it is said:

“It is plain that the agent had actual knowledge that Mrs. Amick owned this property. He acquired this knowledge almost simultaneously with the writing of the policy. He does not claim to have forgotten it, but unhesitatingly says that he knew it all the time, but just ‘unthinkingly’ wrote it up in Amick’s name. If there ever was a case in which actual contemporaneous knowledge of a material fact on an agent’s part should be held to bind the principal, these facts present it. We held in *Deering v. Holcomb*, 26 Wash. 588, 67 Pac. 240, 561, that knowledge acquired by an attorney while employed by the principal a year before bound the principal in another independent employment of the same attorney by the principal after the lapse of that year, so as to start running the statute of limitations against the principal from the date of the last employment. We there said:

“‘It is a general rule that notice to the attorney is notice to his client; that this rule applies to all notices arising in the progress of a case, or as to other matters in which the relation of attorney and client exists at the time of the notice, and it applies not only to knowledge acquired by the attorney in the particular transaction, but to knowledge acquired by him in a prior transaction in which he acquired material information, if the information was so precise and definite that it is or must be present to his mind and memory in the last transaction. *The Distilled Spirits*, 11 Wall. 356; 2 Pomeroy, Equity Jurisprudence, § 672; *Wittenbrock v. Parker*, 102 Cal. 93 (36 Pac. 374, 24 L. R. A. 197, 41 Am. St. Rep. 172).’

“To hold the principal affected with notice in that case where there was no continuous employment, and to hold the contrary in this case where there was a continuous employment covering the period when the knowledge was acquired, because the notice was acquired in a matter in which the agent was acting for

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himself, would be to ignore the rationale of the rule, namely, that it was the duty of the agent to divulge the facts to his principal and to act upon them for his principal, if material to the business in hand, and present in his memory."

The facts in the present case present as strong a case of liability as do the facts in that case. There, the knowledge that the property was covered by the policy of insurance was acquired by the agent in a private transaction of his own. Here, Little, the agent, solicited and wrote the insurance, witnessed the assignment of the policy after the loss, and had full knowledge of the terms and conditions under which the assignment had been made. We are unable to see wherein the *Gaskill* case can be distinguished from the present case. It is unnecessary to again review in detail the question, as it is fully discussed in the opinion in that case. Under the facts found by the trial court, the agent's knowledge of the assignment and its contents was binding upon the appellant, his principal.

The judgment will be reversed, and the cause remanded with direction to enter a judgment in favor of the appellant.

ELLIS, C. J., PARKER, FULLERTON, and WEBSTER, JJ.,
concur.

[No. 14291. Department One. April 26, 1918.]

ADAM GREEN, *Appellant*, v. E. F. BOUTON,
Respondent.¹

APPEAL—REVIEW—RECORD. Error cannot be predicated upon requiring the plaintiff to make an election where neither the pleadings nor the ruling complained of are brought up in the record.

PRINCIPAL AND AGENT—NEGLIGENCE OF AGENT—MEASURE OF DAMAGES—BURDEN OF PROOF. In an action by a principal against his agent for negligence in failing to take security for money loaned for plaintiff, in order to make a *prima facie* case for more than nominal damages it is not necessary to show the insolvency of the debtor; but a *prima facie* case having been made by proof of the negligence of the agent and a reasonable probability that with due care the collection could have been made, the burden is then upon the agent to show a reduction of the loss or that there was no damage.

Appeal from a judgment of the superior court for Clarke county, Back, J., entered November 13, 1916, upon the verdict of a jury rendered in favor of the plaintiff for nominal damages by direction of the court, in an action in tort. Reversed.

Miller & Wilkinson, for appellant.

MAIN, J.—The purpose of this action was to recover damages claimed to be due to the negligence of the defendant in failing to take security for money which he had loaned for the plaintiff. The cause came on for trial before the court and a jury, and at the conclusion of the plaintiff's evidence, the defendant moved for a nonsuit. This motion was denied, and the defendant rested without the introduction of any testimony. Thereupon the court instructed the jury to return a verdict in favor of the plaintiff for nominal damages.

¹Reported in 172 Pac. 576.

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From the judgment entered upon the verdict, the plaintiff appeals.

The facts are these: On or about August 2, 1909, the appellant placed with the respondent the sum of \$500, under an agreement by which the money was to be loaned by the respondent for six months on good security. On August 7, 1909, the respondent loaned the money to one John M. Lay and took the latter's promissory note for the same. The note was not supported by any security. The appellant had no knowledge that the money had been loaned without security until long subsequent to the time the loan was made. On October 31, 1914, the respondent wrote the appellant a letter inclosing the note, stating in the letter that he had made repeated efforts to collect the note and had been unable to do so. Sometime thereafter, the present action was instituted to recover from the respondent damages for failure to take security for the note. Prior to the time this action was instituted, the maker of the note had died and his estate was being probated.

The issues upon which the case was tried were made up by the third amended complaint, the answer thereto and the reply. The appellant, in his brief, states that, in the original complaint, two acts of negligence were pleaded: One, failure to take security; and the other, failure to present the note as a claim against the maker's estate; and that, upon a previous occasion, the cause came on for trial and he was required by the court to elect upon which theory of negligence he would proceed. It is claimed that this ruling was error. However much merit there may seem to be in the contention, if the facts are as stated in the brief, the question is not here for review. The record contains neither the original complaint, the first amended complaint, nor the second amended complaint; nor does it show the ruling complained of. Since the record does not

present the question, it must be passed without determination.

The second contention of the appellant is the error of the trial court in directing a verdict for nominal damages only. As above indicated, at the conclusion of the appellant's case, a motion for nonsuit was made. The court, before passing upon the motion for a nonsuit, inquired of the attorney for the respondent whether he desired to rest his case at that time, and stated that, if the respondent did rest, he would pass upon the motion. The respondent rested. The court then stated that he would deny the motion for nonsuit and instruct the jury that the appellant was entitled to recover only nominal damages. Thereupon the appellant requested that he be permitted to introduce further testimony upon the question of insolvency. To this the respondent objected and the objection was sustained. The jury were then instructed to return a verdict in favor of the appellant for nominal damages.

The question which first arises upon this branch of the case is whether the appellant had made a *prima facie* case as to the amount of damages claimed by him, which was the amount of the note and the unpaid interest thereon. The law appears to be that the measure of liability on the part of the agent for negligence in collecting claims is the amount of damages sustained by the principal, and this is *prima facie* the amount of the debt or claim. When a *prima facie* case has been made, the burden is on the agent to show facts relieving him from liability. Mechem on the Law of Agency (2d ed.), volume 1, § 1320, thus states the law:

"The measure of damages in an action against an agent for negligence in collection is the actual loss sustained. The negligence being established, and it appearing with reasonable probability that but for such negligence the loss would not have happened, that loss

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prima facie is the amount of the claim, but the agent may show that, notwithstanding his negligence, the principal has suffered no loss, and the recovery can then be for nominal damages only. Thus he may show in reduction of damages that if he had used the greatest diligence, the debt could not have been collected; or that the principal's claim against the debtor is delayed only and not lost, or that he is wholly or partially protected by securities which he holds, or that though the principal's claim against certain of the parties is lost, there are still others liable who are amply responsible, from whom the debt can be collected.

"The burden of making such showing seems to rest upon the agent. Thus in a recent case to recover damages against a bank for negligence, it was said: 'It is claimed that there was no proof of damages; that is, that it was not shown that had the bank been diligent the drafts could have been collected. In such cases it is usually impossible to show with certainty that if due care had been observed the collection would have been made. The law is not so rigid in its requirements for the protection of the negligent agent. It is only necessary to show a reasonable probability that with due care the collection would have resulted. The burden then rests on the defendant to show that there was no damage.' "

This text states the law which is supported by the authorities, and it is unnecessary here to multiply citations.

The facts bring this case within the rule stated. The respondent, having rested without the introduction of any evidence, failed to meet the burden placed upon him by law. No appearance has been made in this court by him, he evidently realizing, after further investigation, that the judgment entered was one which could not be sustained. It follows that the judgment must be reversed, and the cause remanded with direction to the superior court to enter a judgment in

favor of the appellant for the amount of the note, accrued and unpaid interest and the costs.

ELLIS, C. J., PARKER, and WEBSTER, JJ., concur.

FULLERTON, J., concurs in the result.

[No. 14385. Department Two. April 26, 1918.]

CHARLES E. THAYER, *Appellant*, v. SNOHOMISH LOGGING
COMPANY, *Respondent*.¹

STATUTES—TITLES AND SUBJECTS—RAILROADS—FENCING ACT—CONSTITUTIONALITY. The railway fence act, Rem. Code, §§ 8731, 8732, providing that railroads shall be liable for the injury or killing of stock in any manner by reason of failing to fence the track does not embrace injuries not happening through moving trains, in view of the constitutional requirement that the subject of the act be expressed in the title, and the title of the act, which was an act compelling the fencing of railroad tracks and declaring the law of negligence with regard to stock "injured by railway trains."

APPEAL—REVIEW—THEORY OF CASE. Where plaintiff's action was based upon defendant's failure to fence its track and the driving of plaintiff's horse upon a bridge where it was killed by a moving train, which was wholly unsupported by evidence, the theory cannot be changed on appeal to a claim of liability for injury to the horse in falling through the bridge.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered May 15, 1917, upon findings in favor of the defendant, in an action for damages for a horse killed by a railway train. Affirmed.

Louis A. Merrick, for appellant.

Cooley, Horan & Mulvihill, for respondent.

HOLCOMB, J.—The action is one to recover damages, and the appeal is taken upon the findings of fact, conclusions of law, and judgment. Appellant assigns three

¹Reported in 172 Pac. 552.

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errors: (1) that the conclusions of law do not follow from the findings of fact and are not supported thereby; (2) that the judgment is not supported by the findings of fact; (3) that the conclusions of law and judgment are not supported by the findings of fact.

In the complaint the negligence charged against the respondent is set forth in paragraph 4 as follows:

“That on or about the 5th day of July, 1916, the said horse, because of the neglect of the defendant to fence his right of way along the track of said railway, wandered upon the track and the train of said defendant came along and drove the said horse upon a bridge upon said right of way, and said horse being unable to get over said bridge, the said train struck the horse and killed it, to the damage of the value of \$350.”

The court found that there was no evidence that a train or other vehicle operated by the defendant struck the horse or frightened or interfered with the horse in any way. Since the evidence is not here, this finding is conclusive upon appellant and upon this court.

Appellant, however, contends that the respondent is liable because of the unfenced right of way and trestle, without any affirmative action upon the part of respondent or its agents, even though there were no trains operated on the road. He argues that the damage suffered by him is the same whether the horse fell through the trestle upon the respondent's right of way which was unfenced, or was killed by collision with a moving train upon the right of way which was unfenced, and that the legislature so intended in enacting §§ 8731 and 8732, Rem. Code. These provisions were taken from the acts of the legislature of 1903 and 1907. The title of the act of 1903, Laws 1903, p. 332, ch. 158, is as follows:

“An act compelling railroads to fence their rights-of-way and to protect the owners of stock injured by

moving railway trains, declaring a law of negligence with regard to stock injured by railway trains."

Section 3 of that act provides that, in all actions against persons, etc., operating steam railroads, for injuries to stock by collision with moving trains, it is *prima facie* evidence of negligence on the part of such railway to show that the railway track was not fenced with a substantial fence or protected by a suitable cattle guard at the place where the stock was injured or killed. The title of the act of 1907, Laws 1907, p. 169, ch. 88, is as follows:

"An act compelling railroads to fence their rights-of-way and to protect the owners of stock injured by moving railway trains, declaring a law of negligence with regard to stock injured by railway trains."

This act is the same as the act of 1903, except that it includes electric railroads and trains, while the former refers only to steam railroad trains.

The second section of each of the acts cited provides that every such railroad shall be liable for all damages sustained in the injury or killing of stock in any manner by reason of the failure of such person, company, or corporation to construct and maintain such fence or crossing or cattle guard, etc. This provision of the enactment in question is the basis upon which appellant forms his theory. But the title of each of the two acts referred to "stock injured by moving railway trains," and declared the law of negligence with regard to "stock injured by railway trains." The third section of each of the acts declared the rule of evidence making it *prima facie* evidence of negligence, "for injury to stock by collision with moving railroad trains," if it was shown that the railway track was not fenced with a substantial fence and cattle guard.

The language of an act should be construed in view of its title and lawful purposes, since the subject ex-

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pressed in the title fixes a limit upon the scope of the act. *State ex rel. Swan v. Taylor*, 21 Wash. 672, 59 Pac. 489. The object of the constitutional requirement that the subject of an act shall be expressed in its title is that no person may be deceived as to what matters are being legislated upon. *Seymour v. Tacoma*, 6 Wash. 138, 32 Pac. 1077. Therefore, from the title and the third section of each act, we are convinced that it was not the intention of the legislature to declare the law of negligence with regard to stock injured other than when injured in some way by railway trains. Under similar but somewhat broader statutes than ours, there are authorities which hold that, if the right of way was unfenced and the injury was caused by moving railway trains, it would not be necessary that the stock come in actual collision with the moving train, but the moving train would have to have some relation to the injury and damage. Here, under the finding of the court, there was no such relation.

Appellant based his case below upon the specific negligence of the failure of the respondent to fence its right of way, the driving of the horse upon the bridge, the inability of the horse to get over the bridge, and its being struck by the train and killed. This being wholly unsupported by the evidence, as found by the court, appellant would have no right to change its theory in this court in any event. Nonliability in such cases as this and under such statutes is directly and inferentially held in: *Asbach v. Chicago, B. & Q. R. Co.*, 74 Iowa 248, 37 N. W. 182; *Liston v. Central Iowa R. Co.*, 70 Iowa 714, 29 N. W. 445; *Maher v. Winona & St. P. R. Co.*, 31 Minn. 401, 18 N. W. 105; *Chicago, K. & N. R. Co. v. Hotz*, 47 Kan. 627, 28 Pac. 695; *Jimerson v. Erie R. Co.*, 203 N. Y. 518, 97 N. E. 48, 37 L. R. A. (N. S.) 1181; *Knight v. New York, L. E. & W. R. Co.*, 99 N. Y. 25, 1 N. E. 108; *Atchison, T. & S. F. R. Co. v.*

Edwards, 20 Kan. 531; *Young v. St. Louis, K. C. & N. R. Co.*, 44 Iowa 172.

The judgment is affirmed.

ELLIS, C. J., MOUNT, MAIN, and CHADWICK, JJ., concur.

[No. 14441. Department Two. April 26, 1918.]

In the Matter of the Estate of EDNA R. SPARK.

R. C. SUGG, *Administrator, et al.*, Appellants, v.

C. C. GRIDLEY, *Respondent*.¹

EXECUTORS AND ADMINISTRATORS—FILING CLAIMS—NECESSITY—SECURED CREDITOR. It was not necessary for a secured creditor to file a claim against the estate, where the administrator, before the time for filing claims had expired, agreed with the claimant, who was secured by mortgage, to pay the mortgage debt out of the first proceeds of the sale of the mortgaged property, if the claimant would consent to the sale.

Appeal from an order of the superior court for Clarke county, Back, J., entered November 28, 1916, directing the payment of a claim against the estate of a decedent, after a hearing before the court. Affirmed.

R. C. Sugg and W. S. Cooper, for appellants.

MOUNT, J.—This appeal is from an order of the superior court in probate, directing an administrator to pay a claim of the respondent for \$300, and interest, as a preferred claim against the estate of Edna R. Spark, deceased.

The facts are stipulated. It appears therefrom that Edna R. Spark owned three-sevenths of her father's estate, having acquired one-seventh thereof under a will and two-sevenths by purchase from other heirs. Edna R. Spark was executrix under her father's will. During her lifetime she executed, for value, a note to

¹Reported in 172 Pac. 545.

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the respondent for \$300 and interest. This note was secured by a mortgage upon her distributive share of her father's estate. Before the note was paid and the mortgage satisfied, she died. R. C. Sugg was thereupon appointed administrator *de bonis non* of her father's estate and administrator of her estate. Her estate consisted of the distributive three-sevenths share of her father's estate. Mr. Gridley filed no claim with the administrator of the estate of Edna R. Spark, relying, of course, upon his mortgage. When the original estate was ready to be distributed, the administrator promised Mr. Gridley that, if he would permit the estate to be sold, his mortgage would be first paid out of the proceeds of the sale. He agreed to this before the time expired for filing claims against the estate, and afterwards an order of the superior court was made permitting the estate to be sold. It was sold for \$2,500, \$500 of which was paid in cash and a first mortgage was given to the administrator for \$2,000. The agreed facts do not state that Mr. Gridley released his mortgage of record, but we assume this was done because it is agreed that the purchaser gave back upon the sale a *first mortgage* for \$2,000. After the sale, Mr. Gridley demanded payment of his note and mortgage as he had been promised by the administrator. All the interested parties were thereupon brought before the court, a hearing was had, and the court ordered the administrator to pay Mr. Gridley the amount of his note with interest. The administrator and the creditors of the estate appeal from that order.

It is argued by the appellants that, because Mr. Gridley filed no claim against the estate within time, his claim should not be allowed as a preferred claim. We think it is plain, under the facts stated, that he was not required to file his claim. The agreement between the administrator and Mr. Gridley that he should

waive his mortgage and that the property be sold in consideration of the payment of his note out of the first money received was in the nature of a settlement of the mortgage, which was, of course, a prior lien upon the estate. It was not necessary, under these circumstances, for Mr. Gridley to file a formal claim against the estate, because he had agreed with the administrator that the property be sold upon condition that his claim should be satisfied out of the first money received from the sale. To hold otherwise would permit the administrator to perpetrate a fraud upon the respondent.

The order appealed from was just and properly made, and is therefore affirmed.

ELLEIS, C. J., CHADWICK, and MAIN, JJ., concur.

[No. 14468. Department One. April 26, 1918.]

THE STATE OF WASHINGTON, *Respondent*, v. GREAT
NORTHERN RAILWAY COMPANY *et al.*, *Appellants*,
J. W. REELY, *Defendant*.¹

INTOXICATING LIQUORS—SEIZURES—SHIPMENTS—PERMITS—EXPIRATION. A shipment of intoxicating liquor to a druggist, which did not reach this state until after the expiration of the thirty days limited in the permit, is contraband, and subject to seizure and forfeiture, under Rem. Code, § 6262-17, requiring a county auditor's permit for such shipments and providing that the permit shall be void after thirty days from the date of issue.

SAME—SEIZURES—EXPIRED PERMITS—DUTY OF CARRIERS. The fact that the shipment was initiated prior to the expiration of the thirty days limited in the permit would not make it the duty of the railroad company to transport it to its destination after it had become contraband by lapse of time.

Appeal from a judgment of the superior court for Spokane county, McCroskey, J., entered June 21, 1917,

¹Reported in 172 Pac. 546.

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upon stipulated facts, confiscating contraband intoxicating liquor. Affirmed.

Tolman, King & Way, for appellant Bloch.

Charles S. Albert and *Thomas Balmer*, for appellants Great Northern Railway Company *et al.*

John B. White and *F. B. Danskin*, for respondent.

WEBSTER, J.—This proceeding was begun by the filing of a complaint with a justice of the peace for Spokane precinct, Spokane county, Washington, and the issuance of a search warrant thereon pursuant to the provisions of ch. 2, Laws of 1915, p. 2, commonly known as the state-wide prohibition law (Rem. Code, § 6262-1 *et seq.*). Under the authority of the search warrant the sheriff seized a quantity of whiskey at the Northern Pacific freight depot in the city of Spokane. Before the return day fixed in the warrant, claims to the liquor were filed by B. K. Bloch, as owner, and the Great Northern Railway Company and the Northern Pacific Railway Company as carriers. A trial in the justice court upon stipulated facts resulted in judgment declaring the liquor forfeited and ordering its destruction. The cause was appealed to the superior court and there tried upon the same stipulated facts, resulting in a judgment that the liquor be forfeited and destroyed forthwith by the sheriff, from which judgment the claimants have appealed. No testimony was introduced upon the trial below, the parties having stipulated in writing that the cause be submitted to the court for decision and judgment upon the following agreed facts:

“That, on the 15th day of March, 1917, on complaint of Clarence Long, for a search warrant, a search warrant directed to the sheriff was issued out of the justice court of the state of Washington in and for Spokane precinct and county, by S. C. Hyde, justice

of the peace, and was executed by the sheriff of Spokane county, who made search of the freight depot of the Northern Pacific Railway Company and seized four crates of intoxicating liquors, which contained approximately 575 quarts of whiskey; that, on November 26th and 28th, 1916, the county auditor of Snohomish county, state of Washington, issued to the Optimus Pharmacy, at the town of Index, state of Washington, four permits authorizing the shipment of four crates of whiskey from the city of Maysville, Kentucky, to said Optimus Pharmacy at the town of Index; that the said Optimus Pharmacy were, and are, registered druggists and pharmacists, actually in business as such at Index, in the state of Washington; that the liquor described in the sheriff's return was shipped on the order of the claimant, B. K. Bloch, by the H. E. Pogue Distillery Company, from Maysville, Kentucky, in four separate crates to said Optimus Pharmacy; that there was attached to each of said crates one of said permits issued as aforesaid by the county auditor of Snohomish county; that, at the time of said shipment, said permits were unexpired and in full force, and that, at the time said four crates of whiskey, so shipped from Maysville, were transported into the state of Washington by the Great Northern Railway Company, more than thirty days had expired from the date of the issuance of said permits; that said liquor reached Index over the line of the claimant, Great Northern Railway Company, but was not delivered to the Optimus Pharmacy; that the agent of the Great Northern Railway Company notified said H. E. Pogue Distillery Company and B. K. Bloch of such non-delivery, and said Bloch requested said Great Northern Railway Company to consign and ship said liquor from Index, Washington, to J. W. Reely at Missoula, Montana; the intention of Bloch being to have said liquor placed in the storage warehouse of said Reely at said point, to be there held subject to his order; that, on the 22d day of February, 1917, the Great Northern Railway Company issued a bill of lading for said liquor to B. K. Bloch, as consignor, in which it was agreed with the shipper to carry said whiskey to its

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usual place of delivery at destination, if on its road, otherwise to deliver to another carrier on the route to said destination, and in which bill of lading it was provided, among other things, that said shipment was 'consigned to J. W. Reely, destination Missoula, state of Montana, route N. P. delivery,' and the original bill of lading so issued was mailed to the consignor, B. K. Bloch. Thereafter the said intoxicating liquor was transported via the Great Northern Railway company's line from Index to Spokane, in the state of Washington; that the Great Northern Railway lines did not extend to Missoula, and at Spokane it was necessary to transfer said intoxicating liquor from the Great Northern Railway Company to the Northern Pacific Railway Company in order for said shipment of four crates of whiskey to be transported to its destination at the city of Missoula; that, on the 22d day of February, 1917, at the time said four crates of whiskey were shipped from Index, consigned as aforesaid, with its destination Missoula, no permits whatsoever were obtained from the county auditor of Snohomish county, state of Washington, authorizing the shipment of said four crates of whiskey from Index to Spokane, the state line, or any other point within the state of Washington, or to Missoula, Montana; that said four crates of whiskey had no permits attached thereto authorizing a common carrier to carry and transport said four crates of whiskey to Spokane, the state line, or any other point within the state of Washington, or to Missoula; that each of said crates of whiskey was labeled on the outside cover so as to plainly show the name of the consignee, and each of said crates had attached thereto one of the printed permits, hereinbefore referred to, issued by the county auditor of Snohomish county on November 26th and 28th, 1916."

Many other facts appear in the stipulation which, for the purpose of this opinion, it will not be necessary to notice.

A number of interesting questions are raised and discussed in the briefs; but since we have reached the

conclusion that the liquor was contraband and subject to confiscation as such from the time it entered the state of Washington, only such matters as are essential to that feature of the case will be considered.

Section 17, ch. 2, Laws of 1915, p. 17 (Id., § 6262-17), provides that any registered druggist or pharmacist actually engaged in business within the state, desiring to transport or ship any intoxicating liquor within the state, shall first secure from the county auditor a permit therefor, which permit can only be used for one shipment "and shall be void after thirty days from the date of issue." Section 18 (Id., § 6262-18) makes it unlawful for any transportation company to knowingly transport or convey any intoxicating liquor within this state without having a permit issued by the county auditor for the transportation of such liquor affixed in a conspicuous place to the parcel or package containing the liquor. Provision is made for search and seizure of the liquor, and for judgment of forfeiture and destruction in the event it shall be determined that the liquor is being kept or possessed in violation of the provisions of the act.

Since it is admitted that, when the shipment reached the state of Washington, more than thirty days had elapsed from the date the permits were issued, it necessarily follows that the shipment was transported within the state to Index and from thence to the place of its seizure under a void permit, which, in legal effect, was no permit at all. Such being the case, the liquor was contraband — subject to seizure, forfeiture and destruction at any place within the limits of the state of Washington.

It is insisted by appellants that, inasmuch as the permits had not expired when the shipment initiated, it was the carrier's duty to transport the shipment to its destination, even though the permits expired while

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the goods were in transit and before they entered this state. In support of such contention, numerous cases are cited involving limited passenger tickets, wherein the courts have held that the clause making tickets void after a certain date must be construed as fixing the latest time for commencing, rather than for completing, the journey. The principle upon which those authorities rest has no application to the case in hand. The duty of a carrier with respect to its passengers who become such by virtue of tickets, limited or otherwise, is one that arises out of contract, express or implied, and it may well be that the carrier, who has received the consideration and accepted the passenger, may not relieve itself of the duty of transporting him to his ultimate destination, even though the time limit fixed by the ticket expires before the end of the journey is reached. No such duty devolves upon a carrier to transport intoxicating liquor where the right to such transportation depends upon the existence of a lawful permit issued pursuant to legislative authority. Manifestly is this so where the legislature, in the exercise of the police power, has made it unlawful for the carrier to transport the shipment without a valid permit. The right here given does not arise out of contract, express or implied. It is merely a privilege granted by the statute to the shipper and to the carrier, conditioned upon its being exercised in accordance with the legislative intent. It is incumbent, therefore, upon those who would avail themselves of the privilege, to bring themselves within the terms and conditions which the legislature has seen fit to impose, one of which is that the shipment may not be made within the state without a lawful permit; the other, that the permit shall be void after thirty days from the date of its issue.

The language of the statute is plain—too plain to admit of construction or interpretation. It simply means that the life of the permit is thirty days, and that, when the time limit has expired, its function ceases. It requires no argument to demonstrate that, under the provisions of this statute, it is unlawful for a carrier to transport intoxicating liquor into or within this state without the permit prescribed by the statute. Neither does it require a reference to any authority other than common sense to support the statement that a void permit is no permit at all.

The evident purpose of the statute requiring that the permit shall be affixed in a conspicuous place to the parcel or package containing the intoxicating liquor was to enable the officers charged with the duty of enforcing the law to ascertain by reference to the permit whether the liquor was being lawfully transported. To hold that the date of the shipment, and not the date of its apprehension by the officer, shall determine whether the goods were being transported within the period of time fixed by the permit would be to shift upon the officer a burden that would effectively prevent in most cases a seasonable enforcement of the law. For example, shipments with expired permits attached are interrupted in transit, some which, in fact, may have been initiated during the life of the permit, others after the permit had expired. The consignments may have moved from different points over diverse routes to a connecting carrier within the state where the goods were apprehended. The facts concerning the date of the shipment, the length of time in transit and the lines over which it had been routed, all rest with the shipper and the carrier. The officer has no means of acquiring them, but, under the principle contended for by appellants, must make the seizure at his peril, notwithstanding the self-evident fact that the goods were in transit

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by virtue of a permit that *prima facie* afforded the carrier no lawful authority for their transportation. Under such circumstances, it is just as unreasonable to assume that the officer could effectually enforce the law, as it would be unjust to censure his dereliction of duty. Clearly, it was the purpose of the legislature in making the permit void when the allotted time had elapsed, to facilitate, rather than to hinder and delay, the enforcement of the law.

Being of the opinion that the permit was void when the shipment was brought into the state of Washington, and that its movement thereafter while within the state was without authority of law, the goods were therefore necessarily contraband and subject to seizure, forfeiture and destruction as such, according to the method prescribed by the statute. The judgment is affirmed.

ELLIS, C. J., MAIN, PARKER, and FULLEBTON, JJ.,
concur.

[No. 14470. Department One. April 26, 1918.]

C. P. PRICE, *Respondent*, v. C. H. HORNBURG, *as*
Hornburg Automobile Company, Appellant.¹

APPEAL—BRIEFS—ASSIGNMENT OF ERROR. In the absence of an assignment of error in the brief, error cannot be based upon exceptions to the exclusion of evidence.

SALES—CONSTRUCTION OF CONTRACT—RIGHT TO TERRITORY—DEPOSIT. A contract whereby a dealer was given "the right to sell" ten motor cars of a certain model in specified territory, and requiring a deposit of fifty dollars on each car when ordered, is not a contract for the sale of ten cars, although there was a prepayment of \$500 as a deposit, in the absence of any reference in the contract to, or proof of, any orders for cars.

SAME—DEALER'S CONTRACT—RECOVERY OF DEPOSIT—BURDEN OF PROOF. In such case, in an action to enforce repayment of the dealer's deposit, as provided in the contract at its expiration after the last car ordered was delivered and paid for, in which the prepayment of the \$500 deposit was admitted, the burden of proof was upon the defendant to show an order for the cars, or some valid defense entitling him to retain the deposit.

Appeal from a judgment of the superior court for Spokane county, Girand, J., entered December 20, 1916, upon findings in favor of the plaintiff, in an action to recover a deposit made under a sales contract, tried to the court. Affirmed.

Barker & Barker, for appellant.

H. J. Hibschan, for respondent.

WEBSTER, J.—On June 14, 1913, appellant, called the "company," and respondent, called the "dealer," entered into a written contract, the provisions thereof pertinent to the present inquiry being as follows:

"The dealer shall have the right to sell, and the company will sell to him, the following styles and types of motor cars, namely, Maxwells, from the following ter-

¹Reported in 172 Pac. 575.

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ritory: Lewis county, and north half of Idaho county, state of Idaho; quantity 10, model Maxwells, discount 15%.

"If any contract to take and pay for cars is unfulfilled by the dealer, the company may retain the amount of any deposit remaining to his credit.

"The dealer, with each order for cars, shall make a deposit or prepayment to the company, in current funds, of not less than fifty dollars (\$50) upon each car ordered, which sum shall be credited by the company to the dealer and will be repaid when last car ordered is delivered and paid for, except that any part or all of said deposit may, at the option of the company, be credited against any part or open account due the company from the dealer."

After the expiration of the contract, respondent brought this action, alleging that, on the date of its execution, he advanced to the appellant and deposited with him the sum of \$500, and that he had paid in full for all automobiles ordered by him; that he had also paid all accounts due from him to the appellant, and that he had demanded the return of the deposit, which demand had been refused. The prayer was for a judgment in the sum of \$500.

For answer, the appellant denied the material allegations of the complaint, and by way of affirmative defense, alleged that, at the time of entering into the contract, respondent ordered from him the ten Maxwell automobiles mentioned therein and paid to him the sum of \$500 as a deposit or prepayment thereon; that respondent took delivery of only one of the cars so ordered; that appellant had in all things complied with the terms of the contract on his part to be performed; that he had been ready, willing and anxious for respondent to take delivery of and pay for the remaining nine automobiles, but that he had failed and refused to do so, and that appellant retained the \$500 as pro-

vided in the contract. The allegations of the affirmative answer were traversed by reply. Upon the issues thus joined the cause was tried to the court sitting without a jury, resulting in a judgment in favor of the plaintiff, from which this appeal is prosecuted.

Upon the trial, over appellant's objection, the court ruled that, under the state of the pleadings, the burden of proof was on the defendant, to which an exception was duly noted. Thereupon the defendant undertook to prove by parol that, at the time of the execution of the contract, the plaintiff ordered ten automobiles, and that the \$500 in question represented the deposit of \$50 on each car as stipulated in the contract, which evidence was rejected by the court. Exception to the exclusion of this testimony was duly taken, but no assignment of error based thereon is made in the brief. While we are inclined to the opinion that this ruling was erroneous, the question is not before us for review. It is insisted, however, that the contract pleaded and relied on by both parties is, on its face, an order for ten automobiles at the price specified in the contract. We cannot accede to this view. The language of the contract in this respect is, "The dealer shall have the right to sell, and the company will sell to him the following types and styles of motor cars." This provision merely gave respondent the right to sell in the territory assigned to him ten Maxwell automobiles, and bound appellant to furnish him not to exceed that number of cars when ordered by the dealer, the contract by its terms clearly contemplating the future order of cars. No mention is made in the agreement of the payment of \$500, and if that sum represents the advance deposit on ten automobiles actually ordered by respondent, proof of such fact rests in parol, or at least must be established independently of the contract. Since no evidence was received on this point, the only

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question remaining is whether the court erred in holding that the burden of proof rested with defendant, this being one of the errors assigned in the brief.

The payment of the \$500 deposit being admitted, and the term of the contract having expired, it was incumbent upon appellant to allege and prove some valid defense or counterclaim which would entitle him to retain the deposit. *Nicolls v. Wetmore*, 174 Iowa 132, 156 N. W. 319.

The burden being on the defendant, and the defendant's evidence in discharge of that burden having been excluded by the court, and there being no assignment of error based upon such ruling, there is no alternative—the judgment must be affirmed.

ELLIS, C. J., FULLERTON, MAIN, and PARKER, JJ., concur.

[No. 14476. Department Two. April 26, 1918.]

JAMES T. KELLEY *et al.*, Respondents, v. GRANT SMITH *et al.*, Appellants.¹

REFORMATION OF INSTRUMENTS — MISTAKE—WANT OF MUTUALITY. Mortgages given by property owners to secure payment of lump sums agreed upon and due under the terms of regrade contracts, cannot be reformed because of the owner's ignorance of his rights under city ordinances providing for a less expensive regrade than the one contracted for, in the absence of any allegation of fraud or mutual mistake.

Appeal from a judgment of the superior court for King county, Jurey, J., entered July 5, 1917, in favor of the plaintiffs, in an action for the reformation of mortgages, tried to the court. Reversed.

Preston & Thorgrimson, for appellants.

James Kiefer, for respondents.

¹Reported in 172 Pac. 542.

HOLCOMB, J.—This action is waged by respondents to adjust, settle, and determine the amount due upon two certain mortgages, alleged to have been executed in ignorance on the part of the mortgagors of the correct and legal amounts for which the mortgagors were liable at the time the mortgages were given. In effect, the action is for the purpose of reforming and altering the mortgages upon the grounds stated. The court granted the relief prayed.

Respondents are the owners of two parcels of lots on two block corners about three blocks apart in the Denny-Hill regrade district, in Seattle. In August, 1917, the city of Seattle entered into a contract with the Rainier Development Company for the grading down of the streets in this district, which also provided for the excavation of private lots at the same time as the streets were cut down, contracts for such work to be entered into on demand of the contractors. This contract was afterwards assigned by the Rainier Development Company to Grant Smith, W. E. Hauser, E. V. Hauser, and S. J. Stillwell, copartners doing business under the firm name of Grant Smith & Co. & Stillwell, who started work on the regrade in 1908. At the time of commencing work, the contractors mailed notices to the various property owners requesting them to enter into contracts for the excavation of their respective parcels of property, the proof showing that such notice was mailed to respondent James T. Kelley, who, at that time, lived in the Yukon Territory near Dawson. On March 12, 1909, a form of contract was sent Mr. Kelley for signing, which he refused to sign. Because of his failure to enter into these contracts, the contractors had to work around his respective pieces of property, leaving them standing some 100 feet above the street grades. In September, 1910, about a year after the contractors had finished excavation in the

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neighborhood of respondents' part of the land, Kelley came to Seattle. Contracts were then entered into for the excavation of the property which, as shown by the copy attached to respondents' bill of particulars, provided, among other things, as follows:

"The said owners shall pay the contractors, as payment in full for the work herein provided for, the sum of \$6,200."

The two contracts were the same, excepting that the other one was for the sum of \$6,100 and covered the other parcel of lots. Work was immediately prosecuted under these contracts, and the excavation completed on one piece in December, 1910, and on the other in January, 1911. Statements of the amounts due were then sent Mr. Kelley, who had returned to Dawson, and mortgages for the respective sums of \$6,100 and \$6,200, in settlement of the amounts due, were executed by himself and wife under an option in the contracts providing therefor, the contracts containing a provision that, if the property owners did not desire to pay cash, they could, within thirty days, give mortgages payable in ten annual installments with seven per cent interest per annum.

To the complaint, as amplified by bill of particulars, a demurrer was interposed and overruled, and thereupon an answer was filed which, after making certain admissions and denials, pleaded three affirmative defenses: (1) A defect of parties, in that all the parties to the original contracts were not made parties to the case; (2) the statute of limitations, as to all payments made on the mortgages prior to December 1, 1913; and (3) estoppel.

Without noticing the first two affirmative defenses urged by appellants, we will pass to the right of respondents to recover at all. The theory of respondents is that they are entitled to the relief which certain

property owners obtained by virtue of the decision of this court in the case of *Atwood v. Smith*, 64 Wash. 470, 117 Pac. 393, holding that it was *ultra vires* for the city of Seattle to attempt to change the established slopes under the ordinances and contracts for the re-grading of the streets and abutting property of which respondents' property is a part. The ordinance requiring the work to be done was upon a property owner's petition, and the petition and the ordinance ordering the work to be done contained the provision,

"That the city of Seattle, in entering into a contract for the performance of said improvement, shall insert therein a provision, for and on behalf of and to the use and benefit of any owner of private property within the district to be assessed for this improvement who may desire said property to be excavated, that said owner shall have the right and privilege to demand that the contractor for this improvement shall excavate said property at the same time as the abutting streets are excavated and at a cost per cubic yard not to exceed the price paid by said contractor for excavating the streets and avenues embraced in the contract, and said contractor shall be required to enter into a contract with said private owners for the performance of said excavation in accordance with the terms and conditions herein provided."

Subsequent to the making of the contract, the city endeavored to change the slopes of the public excavation from a 1 to 1 slope to a 1 to $\frac{3}{4}$ slope, the effect of such action being to increase the cost of the private excavation. It is alleged and shown by evidence that, at the time the change was attempted and at the time the litigation was begun in the *Atwood* case in May, 1910, and up to the time of signing the contracts and mortgages and thereafter, the respondents were residents of Yukon Territory and knew nothing of the change of slope or litigation; that, at the time the contracts were entered into, September, 1910, the case

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of *Atwood v. Smith* had not been tried in the lower court, much less decided by this court, and that little or no publicity had been given to the attempted change of slope. It is, therefore, the contention of respondents that they contracted for the excavation of their lots at a price which is substantially that of the 1 to $\frac{3}{4}$ slope price; that it was the intention of the property owners who petitioned for this work, and of the municipal authorities, to place all property owners in the district whose property should require excavation to bring it down to a practicable and usable level upon the same basis. They further contend that the property owners' petition operated as a contract between the city and the property owners as to the manner and method of doing the work, and particularly as to the amount of the excavation under the contract; and the respondents, having contracted in ignorance of the attempted change in their rights, are entitled, before final payment of the mortgages securing the contract price, to maintain this action to assert their rights under the petition and ordinance and general city contract. They contend that it is settled and established law in this state that no one can be estopped of his rights unless he acts in knowledge of such rights; citing *Stahl v. Schwartz*, 67 Wash. 25, 120 Pac. 856, and *Bardsley v. Sternberg*, 17 Wash. 243, 49 Pac. 499. We are of the opinion that the situation brought about by the decision of *Atwood v. Smith*, *supra*, has no bearing whatever upon this case.

To grant the relief prayed by respondents means nothing else than to reform and modify not only the mortgages, but the previous contracts which had been fully executed and performed by appellants and merged in the mortgages. Respondents, acting through James T. Kelley, for himself and as attorney in fact for his wife, made the contracts on which these mort-

gages are based in Seattle, after having been there at least a day or two, contracting for lump sums to be paid for the excavation of all of the parcels of lots instead of unit prices for so much yardage as might be required to be removed. He had refused to contract in any way for the excavation of their property *at the same time as the abutting streets were excavated*, as provided by the ordinance and the original property owners' petition. At that time he would have had the right to have the contract provide for "a cost per cubic yard not to exceed the price bid by the contractor for excavating the streets and avenues embraced in the contract," and as decided in *Atwood v. Smith, supra*, on the plans and specifications adopted by the city requiring a 1 to 1 slope.

A very similar case is that of *Union Mach. & Supply Co. v. Darnell*, 89 Wash. 226, 154 Pac. 183, where it was held that, where a mortgage, complete and unambiguous in its terms, was given by a failing debtor to secure four certain notes specifically described in the mortgage, the recital of the amount and character of the debt is invulnerable to parol attack, in the absence of fraud or mistake, and it is incompetent to show by parol that, as additional consideration for giving the mortgage, the mortgagee, by a contemporaneous parol agreement, undertook to pay the sum of \$1,000 upon the indebtedness of the mortgagor to a third person, since it varies the written contract by adding new terms and creating new burdens. It was there said:

"We have been cited to no authority, and know of none, holding that, where a mortgage is given to secure a certain indebtedness specifically described therein, the character and components of which are known and admitted, it is competent, without any allegation of fraud or mistake, to prove that, by a contemporaneous parol agreement, it was intended to secure a debt of a

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wholly different origin and character, or an additional sum to be advanced by the mortgagee as an additional consideration for the mortgage. Much less is it competent to prove that, by such an oral agreement, an additional sum was to be paid as an additional consideration without any intention that it should be secured by the mortgage. Such proof in either case would not be proving the consideration merely, but varying and enlarging the contract by adding new terms and conditions and creating new burdens."

So in this case the object of respondents is to diminish the amounts stated to be the indebtedness of their mortgages, varying the contract, and without any allegation of fraud or mistake.

"It is a universal rule that the written contract itself must be resorted to as the source of authority for receiving parol evidence, and where, as here, the contract shows a deliberate agreement complete in itself and formally executed, parol evidence to enlarge its scope or deny its terms is never admissible." *Allen v. Farmers & Merchants Bank of Wenatchee*, 76 Wash. 51, 135 Pac. 621.

See, also, *Gordon v. Parke & Lacy Mach. Co.*, 10 Wash. 18, 38 Pac. 755; *Costello v. Bridges*, 81 Wash. 192, 142 Pac. 687, L. R. A. 1915A 853; *Farley v. Letterman*, 87 Wash. 641, 152 Pac. 515; *Tacoma Mill Co. v. Northern Pac. R. Co.*, 89 Wash. 187, 154 Pac. 173.

"Reformation of an instrument for mutual mistake will not be granted unless the evidence is clear and convincing that the writing was not what the parties intended and that the mistake was mutual." *Moore v. Parker*, 83 Wash. 399, 145 Pac. 440 (Syllabus).

See, also, *Anderson v. Freeman*, 88 Wash. 608, 153 Pac. 307; *Bruce v. Grays Harbor Drug Co.*, 68 Wash. 668, 123 Pac. 1075.

"If the ground upon which its exercise is invoked be a mistake, as in the present case, a mistake on one

side will not be sufficient. It must be a mutual one. . . . Not only must a mutual mistake be shown, but the precise agreement which the parties intended, but failed, to express, must be proven"

by evidence clear and convincing. *Miller v. Stuart*, 107 Md. 23, 68 Atl. 273.

The pleadings do not allege any mutual mistake or fraud, and none was proven. Respondents have no more right to recover in this form of action than they would have to recover the payments which they made; or, if they had paid the entire amount of the contracts in cash instead of availing themselves of the option to give mortgages for the amounts due thereunder, to recover the cash paid for the performance of the contract.

The decree must be reversed.

ELLIS, C. J., CHADWICK, MOUNT, and PARKER, JJ., concur.

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[No. 14511. Department One. April 26, 1918.]

P. G. MALTBIE *et al.*, Respondents, v. JOEL P. GADD
et al., Appellants.¹

PLEADING—ANSWER—MOTION TO STRIKE—DEMURRER. A motion to strike an amended answer because similar to the original may be treated as a demurrer and sustained.

SALES—BREACH OF WARRANTY—WAIVER. A warranty that a pump will pump a certain quantity of water is waived where it was breached at the inception of the contract, and the greater part of the purchase price was paid thereafter, and the obligation to pay the balance was renewed four years later.

PLEADING—TRIAL AMENDMENT. Where defendants did not take advantage of leave to amend an affirmative answer, after a demurrer thereto was sustained, but went to trial on denials, it is not error to refuse leave to make a trial amendment or accept an offer of proof thereunder.

SALES—BREACH OF WARRANTY—DEFENSE—RETURN OF PROPERTY. Where the buyer had waived breach of warranty of a pump, a tender of its return is no defense to an action for the balance of the purchase price.

Appeal from a judgment of the superior court for Grant county, Hill, J., entered June 12, 1917, upon findings in favor of the plaintiffs, in an action on a promissory note, tried to the court. Affirmed.

W. E. Southard, for appellants.

C. J. Lambert, for respondents.

FULLERTON, J.—In June, 1909, the respondents sold and delivered to the appellants a pumping outfit consisting of a gas engine, a pump with its appurtenances, and certain piping. The price agreed upon was \$725. Of this sum \$10 was paid in cash, and for the balance a promissory note was given secured by a

¹Reported in 172 Pac. 557.

mortgage upon real property. Between the date of the sale and October 15, 1913, the appellants paid on the note \$616, and on that date gave a new note for the remainder due in the sum of \$336.60, securing it by a mortgage upon the same property.

In 1916, the note not having been paid, the respondents began the present action to recover thereon and foreclose the mortgage given to secure it. The complaint was in the usual form in such cases. The answer of the appellants, after certain denials, set up the facts of the sale, averring the giving of the original notes and the payments thereon, and the giving of the note sued upon. It then set up a warranty in the contract of sale and its breach by the respondents. To the affirmative matter of the answer, the respondents interposed a demurrer, which the trial court sustained. The appellants thereupon filed an amended answer, setting forth the matters contained in the first in somewhat different language, but in substance the same. The defendants moved to strike the amended answer on the ground that it was not different in effect from the original answer to which the demurrer was sustained. The trial court refused to entertain the motion in the form as made, but announced to counsel that he would treat it as a demurrer and hear it as such. Later on it was so heard and sustained as to the affirmative matter therein set forth. Leave was granted the appellants to amend if they so desired, but no amended answer was filed, and the cause was brought on for hearing on the complaint and the denials in the answer. At this hearing the appellants asked leave to amend a certain paragraph of the affirmative defense by adding a clause thereto. This leave was denied, when the cause proceeded to trial on the issues as then framed. After the respondents had rested, the appel-

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lants offered evidence to sustain the affirmative matters set out in the amended answer, to which the trial court sustained an objection. The appellants then made an offer of proof and rested, whereupon judgment was entered for the respondents in accordance with the prayer of their complaint. This appeal followed.

Errors are assigned on the rulings of the court: (1) In treating the respondents' motion to the affirmative matter in the answer as a demurrer and sustaining it; (2) in refusing to allow the amendment offered to the affirmative answer at the trial; (3) in rejecting the appellants' evidence in accordance with its offer of proof; (4) in entering judgment for the respondents.

Noticing the assignments in the order stated, it was not error on the part of the court to treat the motion as a demurrer to the answer and hear it as such. This was purely a question of practice, so far within the discretion of the trial court that it may be questioned whether it is subject to review in any case, but certainly not unless for manifest abuse, nothing of which is shown here. As a demurrer it was rightly sustained. The breach of warranty alleged was the failure to properly install the pump in the well of the appellants, so that it would pump the quantity of water named in the warranty or comply in other particulars with its terms. But the warranty was breached at the inception of the contract and was waived by the subsequent conduct of the appellants. They not only paid the greater part of the purchase price thereafter, but more than four years later renewed their obligation to pay the remainder of the price. Seemingly, if a waiver of a breach of warranty could ever be made, there was a waiver in this instance. Their knowledge of the breach was as complete when they gave the second note as it

was at any time afterwards, and the giving of the note alone with that knowledge would constitute a waiver of the breach. *Means v. Subers Sons*, 115 Ga. 371, 41 S. E. 633.

The only case from our own court called to our attention which approaches this one in its facts is *Huntington v. Lombard*, 22 Wash. 202, 60 Pac. 414. But in that case the note sued upon was given prior to the time the pump sold could be tested, and the defense of breach of warranty was set up when the purchase price note was sought to be enforced. Here there was not only a substantial payment on the original note, but a renewal note given after the breach occurred. The difference is material.

The refusal to allow the trial amendment was not error. At that time the appellants had no affirmative answer in the record to which the proffered amendment could be applicable. Leave had been granted them to file such an amended answer, but they had not taken advantage of the offer; on the contrary, they had gone to trial on the issues made by the allegations of the complaint and their denials thereto. But more than this, the amendment offered added nothing to the allegations of the answer, treating it as in the record. It was simply a tender of the return of the property. This was not necessary to enable them to recoup for the breach of warranty. If their plea had been timely made, it would have been as potent as a set-off without such a tender as with it.

Nor was there error in rejecting the offer of proof. It was but a restatement of the facts set forth in the answers to which the demurrers had been sustained. Waiving the objection that it was so far affirmative matter as not to be admissible without a plea, it contained nothing material not set forth in the answers

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filed. For the reason that the answers failed to constitute a defense, it likewise failed.

The judgment was in accord with the record and is not objectionable.

The judgment will stand affirmed.

ELLIS, C. J., WEBSTER, MAIN, and PARKER, JJ., concur.

[No. 14518. Department One. April 26, 1918.]

PAUL J. SUSMANN, *by his Guardian etc., Appellant*, v.
YOUNG MEN'S CHRISTIAN ASSOCIATION OF
SEATTLE, *Respondent*.¹

CHARITIES—TORTS—LIABILITY. If a Young Men's Christian Association is a charitable or benevolent association, it is not liable for personal injuries sustained through the negligence of its servant in running a passenger elevator.

EVIDENCE—JUDICIAL NOTICE—Y. M. C. A. CHARITABLE PURPOSES. The courts cannot take judicial notice that an independent Young Men's Christian Association incorporated under the laws of this state is essentially a charitable and benevolent association within the rule of nonliability for negligence of its employees.

CHARITIES—TORTS OF SERVANTS—PLEADING—COMPLAINT. A complaint for personal injuries fails to show that a Young Men's Christian Association is a charitable and benevolent association within the rule of nonliability for the negligence of its employees, where, though its articles indicated design for charitable purposes, it is alleged that charges were made for benefits and privileges equal in amount to charges made by institutions operated for gain, and it was not shown that it had no capital stock or that all or any considerable part of its gains were applied to charity.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered June 2, 1917, upon sustaining a demurrer to the complaint, dismissing an action for personal injuries sustained through the operation of a passenger elevator. Reversed.

¹Reported in 172 Pac. 554.

Walter S. Fulton and Arch F. Williams, for appellant.

J. Speed Smith, Henry Elliott, Jr., and James B. Murphy, for respondent.

FULLERTON, J.—The appellant, a student and patron of the respondent, Young Men's Christian Association, sought to recover in damages from the respondent for injuries sustained because of the negligent operation of a passenger elevator in the association's building by one of its employees. A demurrer was interposed to the complaint, which the trial court sustained. The appellant elected to stand on his complaint, and appeals from the judgment of dismissal which followed.

The complaint, omitting the formal parts, is as follows:

“(1) That plaintiff is a resident of Seattle, King county, Washington, and is of the age of thirteen years; that heretofore Mary B. Martin, who is plaintiff's mother, and is also a resident of Seattle, Washington, was duly and regularly appointed by the above entitled court, guardian *ad litem* of plaintiff for the purpose of commencing and prosecuting this action, and she is now the duly appointed, qualified and acting guardian *ad litem* of plaintiff for such purpose.

“(2) That the defendant is a corporation duly organized and existing under and by virtue of the laws of the state of Washington, with its principal place of business in Seattle, King county, Washington, and its articles of incorporation provide *inter alia* as follows:

“‘Section 3. The object of the corporation shall be the improvement of the spiritual, mental, social and physical condition of the young men of Seattle by the support and maintenance of lectures, Gospel services, libraries, reading rooms, gymnasiums, recreation grounds etc., social meetings and such other means as may conduce to the accomplishment of this object.

“‘The board of trustees shall devote the property of the association, of which they have the management

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and the income thereof to the purposes named herein and for no other, and so long as the board of directors shall so expend the same, the board of trustees shall pay over to them the income of the property of the association so managed by them.'

"(3) That in the prosecution of its business the defendant owns that certain brick building known as the Y. M. C. A. building, located at the southwest corner of Madison street and Fourth avenue in Seattle; that in said building the defendant maintains gymnasium rooms, a social hall, and reading rooms, an educational department with offices and class rooms, a laboratory, machine shop, library, a lobby, an auditorium, a boys' department with offices, a cafeteria, barber shop, shower and steam baths, swimming pool and sleeping rooms for rent, and in connection with its educational department said defendant maintains in said building a school in which general branches are taught and instruction in bookkeeping, typewriting, stenography and other special courses is given, and for instruction in said branches and courses, charges are made to persons taking or receiving the benefit thereof, said charges equalling in amount the prices charged for like instruction by business colleges and other schools in the city of Seattle which give instruction for profit, and for services and privileges in said barber shop, cafeteria, gymnasium and baths, and for the use of said sleeping rooms, charges are made which equal in amount the prices charged for like services, privileges and rooms by other concerns in the city of Seattle organized and operated for profit.

"(4) That on the 23rd day of June, 1916, plaintiff, Paul J. Susmann, was a pupil in the school of defendant, and, through his mother, had paid to the defendant the tuition charges required by it for plaintiff's instruction.

"(5) That on said day and at about the hour of 8:25 o'clock a. m., plaintiff was on the third floor of defendant's said building desirous of proceeding to his class room on an upper floor and for the purpose of being transported to his class room, he signalled for the passenger elevator maintained and operated by

the defendant in said building, and in pursuance of plaintiff's signal, said elevator then and there operated by an employe and agent of the defendant came from the lower floor and stopped at the level of the third floor for the purpose of receiving plaintiff as a passenger; that as plaintiff was in the act of entering the elevator and before he had time to enter it, the operator thereof negligently and carelessly and without notice or warning to him and with the door of the elevator shaft open, caused the elevator to leave the level of said floor and thereby the plaintiff was thrown upon the edge of the elevator floor and was carried several feet above the level of the third floor, when, being unable to retain his position, plaintiff was forced to relinquish the same and thereby fell four stories and into the basement of the building, a distance of approximately sixty feet, thereby receiving injuries as hereinafter more specifically set forth.

“(6) That the fall of plaintiff and his injuries were due to the negligence and carelessness of the defendant, in that the defendant, at the time of plaintiff's injuries and for a long time previous thereto, had maintained said elevator in a condition violative of section 667 of Ordinance No. 31578 of the city of Seattle, approved July 22nd, 1913, providing as follows: Every door and gate to an elevator shaft shall always be closed when the elevator leaves the level of the floor or be so designed that the elevator cannot be started until they are closed.’ And violative of ordinance No. 24761 of the city of Seattle, approved August 2, 1910, containing the same provision, which was superseded by said ordinance No. 31578, in this, that the door to the elevator shaft on the third floor of defendant's said building was so constructed and maintained that it could not be closed as the elevator left the level of the floor, or at all, and was not so designed as to prevent the elevator from being started until it was closed; that the fall of plaintiff was due to the further negligence and carelessness of the defendant in that the operator of said elevator failed and neglected to stop the elevator at the level of said floor a sufficient length of time to enable the plaintiff to enter

the same, but on the contrary, started the elevator as the plaintiff was in the act of entering it and before he had time safely to enter, with the result that plaintiff was thrown and was compelled to hang on to the edge of the floor of said elevator in an attempt to save himself from being dropped down the elevator shaft which was unguarded and unprotected, and thereby he fell as hereinbefore alleged.

“(7) That as a result of said fall, plaintiff, who previously was strong physically and mentally, was knocked unconscious, in which condition he remained for a period of three weeks, during which time he was confined to the Seattle General Hospital, and thereafter he was taken to his home and confined to his bed under medical care; that both his arms were broken, and his right arm was dislocated at the elbow, his left arm was broken at the wrist, his left hand was bruised and permanently stiffened, thereby deforming the same, a piece of the bone of plaintiff's left wrist was broken off and the wrist permanently stiffened; that plaintiff's skull was fractured at the base of the brain, and he sustained permanent internal injuries of a nature unknown to the plaintiff, but which have caused plaintiff much suffering in body and mind; that due to the fracture of plaintiff's skull atrophy of the optic nerve has occurred and plaintiff has but three-tenths of his normal vision, which condition is permanent and progressive, and, as plaintiff believes and alleges the fact to be, will result in total blindness; that as a further result of said fall plaintiff's right side was paralyzed for several days and he sustained abrasions about the limbs and an abrasion and cut under the right eye, and, due to his injuries, plaintiff's mind has been affected in that while he is thirteen years of age, he has not the mental capacity of a child above five or six years, and plaintiff is informed and believes and alleges the fact to be that this condition is permanent; that as a further result of plaintiff's injuries he has had to incur an indebtedness for hospital attendance in the sum of \$188, an indebtedness for nursing in the sum of \$162, and an indebtedness for doctor's bills in the sum of \$600, and will be compelled to incur a fur-

ther indebtedness for medical attendance due to his injuries in the sum of \$200.

"(8) That in all, plaintiff has been and is damaged, as a result of his injuries due to the negligence and carelessness of the defendant as herein alleged, in the sum of thirty-five thousand dollars.

"(9) That at the time of said accident defendant carried an elevator liability policy of insurance in the Aetna Insurance Company, whereby in consideration of a certain premium which had theretofore been paid by defendant, said Aetna Insurance Company agreed that if any person or persons should sustain bodily injuries, while entering upon or alighting from said elevator, as plaintiff was injured, said Aetna Insurance Company would indemnify defendant against liability on account thereof up to an amount not exceeding five thousand dollars; that subsequent to plaintiff's injuries and prior to the commencement of this action, the claim of plaintiff was referred by defendant to said Aetna Insurance Company and was investigated by the attorney for said Aetna Insurance Company; that since the commencement of this action, defendant has been represented in this action by an attorney employed by said Aetna Insurance Company, and if a judgment is recovered against defendant in this action, it will be paid to the extent of the liability of said Aetna Insurance Company under said policy of insurance."

The trial court sustained the demurrer on the ground that the respondent is maintained as a benevolent and charitable institution, and as such is not liable for torts committed by its servants against a patron of the institution, in the absence of a showing that it failed to exercise reasonable care in the selection of the servant. The rule applied by the court is the settled rule in this state, and if it appears from the complaint that the respondent is a benevolent and charitable institution, the demurrer was properly sustained. *Wharton v. Warner*, 75 Wash. 470, 135 Pac. 235; *Magnuson v. Swedish Hospital*, 99 Wash. 399, 169 Pac. 828.

It may be conceded, we think, that the purposes for which this corporation is organized are, in the wider sense, benevolent and charitable. Benevolence and charity do not consist wholly of almsgiving. While to relieve the wants of the helpless, the needy, or the indigent is charity, it is not the only form of charity. To engage in the work of improving the spiritual, mental, social and physical condition of young men by the maintenance of lectures, gospel services, libraries, reading rooms, gymnasiums, recreation grounds, social meetings, and such other things as may conduce to these objects so that the beneficiaries may not become helpless, needy, or indigent, is more to the purpose and is, when done gratuitously, perhaps the purest form of charity. But it is not charity in the legal sense to do these things for the purposes of gain, profit, or private advantage, or in the anticipation of gain, profit, or private advantage.

The term "charity" in itself implies gift in some form; it implies the bestowal of goods or money, the rendition of services, or the awarding of privileges, free to the recipient, without gainful return or the anticipation of gainful return to the donors. Hence it is not charity in a legal, or in any sense, to confer benefits which would be charitable if done without gain or the anticipation of gain, when the recipient, in order to receive the benefits, is required to return an adequate consideration. In other words, a charitable corporation to be such must not only engage in works tending to the betterment of mankind, but it must do so as a charity. If it renders no services except those for which it receives an adequate reward it is a business, not a charitable concern, and cannot claim the immunities of the latter. This is not to say that it has not the character of a charitable institution merely because it may exact compensation from those desir-

ing its privileges to the extent of their ability to pay. It is but to say that it is not a charity if it does no charity—if its privileges are extended to those only who have the ability and willingness to pay full value for the privileges afforded.

Whether the respondent is or is not a charitable association, as the question is now presented to us, must be determined from the allegations of the complaint. The respondent contends that we may take judicial notice of the objects and purposes of such associations, and may know judicially that they are essentially benevolent and charitable. But this is true only to a limited extent. We may know historically that the association originally founded under the name of Young Men's Christian Association was essentially charitable, but we cannot know judicially that the many independent organizations now existing under the same name are so. The particular association is an incorporation under the laws of this state, and its powers and privileges are such as the state laws confer upon it and permit it to assume in its articles of incorporation. We have, it is true, laws permitting the incorporation of purely charitable associations, but we have laws also which permit incorporation for business purposes, and whether this one is so incorporated or not depends upon its articles of incorporation and the manner in which it conducts its business thereunder, not upon the general character of the original institution whose name it bears.

Turning to the complaint, it is at once apparent that it does not there appear to be a charitable association under the legal meaning of that term. While its purposes as defined in its articles of incorporation are designed and adapted to the accomplishment of charitable purposes, it is not shown that it pursues them as a charity. On the contrary, the allegation is that, for

the services rendered, charges are made to the recipients of its benefits and privileges equal in amount to charges made for like benefits and privileges furnished by other institutions ostensibly operated for gain and profit. Nor is it shown that it has no capital stock, nor that the incorporators or members can derive no profit from the conduct of the business of the association, nor does it appear that its gains, as was shown in the case of *Magnuson v. Swedish Hospital*, are all, or in any considerable part, applied to the maintenance of the association or in the furtherance of its purposes and designs.

We attach no particular importance to the allegation that the duty violated resulting in the injury was expressly imposed by an ordinance of the city of Seattle, nor to the allegation that the respondent had procured indemnity insurance upon its elevator. A statute or ordinance, it is true, may create a liability where none before existed, but to accomplish that purpose it must be designed to that end. Here there is nothing to indicate that the municipal authorities enacting the ordinance intended thereby to create a liability against charitable institutions otherwise exempt from liability, and without some such express or implied intent none can be presumed to exist. The taking of indemnity insurance was but the exercise of business prudence. At any rate it could create no liability where none before existed, however much it might weigh as evidence of the construction the corporation placed upon its limitations and powers.

It will not be understood that we hold, even for the purposes of the particular case, that the respondent is not a charitable corporation. What we hold is that it does not so appear from the allegations of the complaint. The allegations of the complaint are, of course,

disputable, but we are clear that they are sufficient to require the respondent to answer.

The judgment is reversed, and the case remanded for further proceedings in the court below.

ELLIS, C. J., PARKER, MAIN, and WEBSTER, JJ., concur.

[No. 14553. Department One. April 26, 1918.]

THE CITY OF PASCO, *Appellant*, v. PACIFIC COAST
CASUALTY COMPANY, *Respondent*.¹

JUDGMENT—BAR—MATTERS AND PARTIES CONCLUDED—PRINCIPAL AND SURETY. A judgment in favor of a city entered upon an accounting between a contractor and the city is not conclusive upon the contractor's surety in the city's subsequent action to recover on the contractor's bond, upon an issue as to the release of the surety by material alterations, extras, and the diversion of payments in contravention of the surety's contract; as such issue was not litigated or before the court in the former action; and it is immaterial that the surety assisted the contractor in its defense of the former action.

PRINCIPAL AND SURETY—STATUTORY BOND—CONSTRUCTION. A contractor's bond, reciting that it is given in compliance with the statute requiring bonds for the benefit of specified persons, must be held to be intended as a statutory bond, and not an agreement making the surety a joint principal with the contractor on city work without right to the defenses of a surety.

Appeal from a judgment of the superior court for Franklin county, Linn, J., entered February 13, 1917, upon findings in favor of the defendant, dismissing an action on contract, tried to the court. Affirmed.

C. M. O'Brien and *Gerard Ryzek*, for appellant.

Danson, Williams & Danson and *C. W. Johnson* (*George D. Lantz*, of counsel), for respondent.

FULLERTON, J.—The city of Pasco, on August 1, 1911, entered into a contract with one A. R. Garey for

¹Reported in 172 Pac. 566.

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the construction of a city hall. The statutory bond for the protection of laborers and materialmen was given with the respondent herein, the Pacific Coast Casualty Company, as surety. Before the completion of the work, the city of Pasco declared the contract forfeited and itself finished the construction of the building. Thereafter Garey brought an action against the city to recover moneys claimed as due him under the contract, and, on an accounting had between the parties on the affirmative defense set up by the city, judgment was awarded against Garey in the sum of \$4,353.64, which on appeal to this court was reduced to \$3,478.74. The facts in that case will be found fully set out in *Garey v. Pasco*, 89 Wash. 382, 154 Pac. 433. Subsequently the city of Pasco instituted the present action to recover from the respondent surety company the amount of its judgment against Garey.

The respondent pleaded as affirmative defenses: (1) That it had been released by material alterations made in the building contract between the city and Garey without its knowledge and consent; (2) that the contract provided that the city, in making payments as the work progressed, should hold back fifteen per cent of the contract price on partial and final payments, but that the city failed to retain such percentage, and in fact paid the contractor in full before the completion of the contract; that such sums so received were diverted to other purposes than payment of material and labor claims, and that respondent had been compelled to pay such claims, thus discharging it from liability on its bond; (3) that extras and additions in the building, without the written order of the architect, were made by the city in contravention of the provisions of the contract and at an additional outlay of \$4,921.50; and (4) that the costs of making the alterations and additions for which recovery is sought were incurred

more than three years prior to the commencement of this action and are barred by the statute of limitations. The city replied, setting up that the matters therein alleged were *res judicata* under the judgment rendered in the prior action of *Garey v. Pasco, supra*. The cause was tried to the court, which made the following findings of fact:

“(1) That it has jurisdiction over the parties and subject-matter in said cause; that heretofore, on or about the first day of August, 1911, one A. R. Garey entered into a written contract with the plaintiff city of Pasco for the construction of a building known as the City Hall building, at an agreed price of \$27,492, less proper deductions. That thereafter the city of Pasco and the said A. R. Garey made deductions amounting to \$3,405 from said contract price, and before the completion of said building paid to the said A. R. Garey the sum of \$23,368.20, and further paid on the order of said A. R. Garey the sum of \$593.95, or a total payment to Garey or his order of \$23,962.15. That the original contract price, less the deduction which was made immediately after the execution of the contract, left the contract price for the building at the sum of \$24,087. That at the time of entering into the contract as hereinbefore stated, with the city, the defendant in this action executed the surety bond conditioned for the faithful performance of said contract, as provided by chapter 207 of the Session Laws of the state of Washington for the year 1909.

“(2) That the plaintiff city of Pasco terminated the contract with Garey prior to the completion of the building, leaving unpaid a number of laborers and materialmen, which were paid by the defendant bonding company.

“(3) That the contract referred to was the uniform form of contract, and provided among other things, that the city should pay to the contractor eighty-five per cent of the amount earned as work progressed, the remaining fifteen per cent to be retained by the city for a period of sixty days, after the completion of the

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building, for the purpose of securing the payment of laborers and material.

“(4) That, after the termination of said contract, Garey brought an action against the city of Pasco to recover an alleged amount claimed to be due from the city on account of extras furnished during the progress of the building. In this action the city counter-claimed against Garey and recovered a judgment for about forty three hundred dollars. The cause was appealed to the supreme court of this state and modified, reducing said judgment to the sum of \$3,478.74. That no judgment was ever entered upon the remittitur as returned from the supreme court.

“(5) That, after the return of said remittitur, the present action was commenced by the city of Pasco against this defendant, in which action this defendant claims that it was relieved from liability upon the bond by reason of certain acts of the said city, some of them being:

“First. The material alteration and change in plans and specifications, which changes increased the cost of constructing the building.

“Second. The overpayment to Garey of the amount due him.

“(6) The court finds, upon the defendant's contentions, from the evidence adduced at the trial, that the building was materially changed without the consent of the defendant herein, and that such change added to the cost of the construction of the building, and also that the city of Pasco failed to reserve the fifteen per cent as provided in the contract. That approximately the entire amount of the contract price was paid to Garey prior to the completion of the building, and without the consent or knowledge of the defendant surety company.

“(7) The court further finds that the question of the surety's liability was not an issue in the case of Garey vs. the City of Pasco, and that the defendant surety company was not a party thereto and was not tendered the defense therein.

“(8) The court further finds that, after the termination of the contract between Garey and the plaintiff city, the defendant surety company received notice

that the contract was terminated, which notice contained information that there was between \$6,000 and \$7,000 due the said Garey, and thereafter the defendant surety company paid for labor and material expended upon said building approximately \$7,000, and that this amount was paid prior to the time that the defendant surety company ascertained that the fifteen per cent had not been reserved as provided for in the contract."

As conclusions of law, the court found that the judgment in the action of *Garey v. Pasco* was not *res judicata* as to the respondent, and that the respondent was discharged from liability as surety by reason of material alterations in the contract and the dissipation of the fifteen per cent of the contract price which should have been retained under the contract. Judgment was rendered dismissing the action, from which this appeal is prosecuted.

While the appellant has assigned error upon all of the findings of fact made by the court, its argument is directed against the finding to the effect that the respondent's liability was not an issue in the case of *Garey v. Pasco*, and to the conclusion of law that the judgment rendered in that case was not conclusive against the respondent as the surety of the record plaintiff. We shall not, therefore, discuss the other findings made. It suffices to say that they are abundantly sustained by the evidence, and are sufficient to sustain the conclusion of law to the effect that the respondent was discharged thereby from liability to the city on its bond, if it is not foreclosed by the judgment entered in the case mentioned.

That the respondent was not foreclosed by that judgment of the defense here interposed we think is equally clear. The judgment, it will be remembered, was recovered by the city on an affirmative issue set forth in an answer in a suit brought by the contractor against

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it. The respondent is sought to be holden on the judgment because, through its counsel, it assisted the plaintiff in waging his affirmative issue and in maintaining his defense to the affirmative issue waged by the city. The defense it interposes to the present action was neither made an issue therein by the pleadings or by the evidence, nor was it actually adjudicated in the final judgment of the court. But more than this, the question could not have been made an issue in that cause by the parties to the record as the record then stood. Between the actual parties it was an immaterial inquiry. It may be that, since the respondent was a surety of the plaintiff and liable over to the city, the city could, under our practice, have brought the respondent in and compelled it to set up its defenses or be barred from subsequently waging them. But the city was privileged to wage its own action in its own way, and since it did not choose to make the respondent an actual party, thus giving it an opportunity to set up defenses personal to itself, it cannot now be heard to urge that it is barred of these personal defenses merely because it participated in an action between other parties in which the defenses were not an issue.

The cases cited by the appellant, as we understand them, do not maintain a different principle. Without reviewing them or specially referring to them, it may be conceded that they sustain the doctrine that one secondarily liable, participating in an action brought against his principal, is estopped by the judgment entered on the issues actually tried therein and perhaps issues actually triable therein. But none of them go to the extent of holding that a surety is barred by that circumstance, when sued on the judgment entered in such an action, from defending on any ground personal to himself which was not an issue and could not be

made an issue in the action as it was waged. As applied to the present case, the rule would mean that the respondent is estopped from asserting that the contract between its principal and the city was not breached by its principal, or that the damages awarded for the breach were not a just measure of the damages flowing therefrom; but it does not mean that it is estopped from urging that the original contract for the performance of which it became surety was so far changed and modified without its consent by the parties thereto as to relieve it from its obligation to answer over.

In the reply brief of the appellant it is urged that the bond executed by the respondent is so worded as to make it a joint principal with the contractor, and that in consequence the defenses urged by it are not open to it. An examination of the bond shows that it contains language which, although not entirely clear, might be given this interpretation, but the bond, when read as a whole, is clear as to its purpose and meaning. Further on it specifically recites that it is intended to be made in compliance with the chapter of the laws requiring bonds in this class of contracts, and that the persons for whose benefit the bond is given shall have the right to sue thereon "on compliance with the provisions of said chapter 207 of the Session Laws of the state of Washington for the year 1909." That it was intended as the ordinary statutory bond we think these recitals hardly leave room for doubt.

The conclusions reached require an affirmance of the judgment, and it will be so ordered.

ELLIS, C. J., PARKER, MAIN, and WEBSTER, JJ., concur.

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Statement of Case.

[No. 14564½. Department One. April 26, 1918.]

THE STATE OF WASHINGTON, *Respondent*, v.
HARRY VAN VLACK, *Appellant*.¹

FISH—CLAMS—CLOSED SEASON—STATUTES—CONSTRUCTION—"TIDE LANDS." Rem. Code, § 5150-100, making it unlawful to take clams from any of the "tide lands" on Puget Sound for the purpose of sale or canning during the closed season, applies to all lands which in their natural state are affected by the ebb and flow of the tide, regardless of whether the title has passed from the state.

SAME—CLAMS—PRIVATE OWNERSHIP. Clams, because of their fixed habitation in the soil, become the subject of private ownership when the title to clam beds passes from the state.

EVIDENCE—JUDICIAL NOTICE—NATURAL LAWS. The courts may take judicial notice of the scientific facts and well known natural laws respecting the spawning season and propagation of clams.

CONSTITUTIONAL LAW—POLICE POWER—CONSERVATION OF FOOD SUPPLY—TAKING PROPERTY WITHOUT DUE PROCESS OF LAW—CLOSED SEASON FOR CLAMS. Rem. Code, § 5150-100, making it unlawful to take clams from any of the "tide lands" on Puget Sound for the purpose of sale or canning, between the first days of April and September of each year, is a lawful exercise of the police power in promoting the general welfare by conserving and increasing the food supply; since the state, although divested of its ownership of clams on tide lands privately owned, has power to regulate the industry for the general good and restrict the owner's use and enjoyment of property, which the statute neither takes nor destroys without due process of law.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered August 24, 1917, upon a trial and conviction of having possession of clams during the closed season. Affirmed.

E. N. Steele, for appellant.

The Attorney General and *Glenn J. Fairbrook*, *Assistant*, for respondent.

¹Reported in 172 Pac. 563.

WEBSTER, J.—On July 10, 1917, an information was filed in the superior court against the appellant, the charging part of which is as follows:

“Then and there being, he the said Harry Van Vlack, did unlawfully have in his possession one sack of clams purchased by him, the said Harry Van Vlack, from one C. A. Schneider, which said clams were taken for the purpose of sale on or about April 26, 1917, and subsequent to April 1, 1917, by said C. A. Schneider from tide lands abutting on Puget Sound and owned by said C. A. Schneider.”

To this information, appellant filed a general demurrer, which was overruled. Refusing to plead further, sentence was pronounced and judgment thereon entered against appellant, from which this appeal was taken. The prosecution is based upon § 100, ch. 31, Laws of 1915, page 108, which reads:

“It shall be unlawful for any person to take or dig clams or mussels from any of the tide lands abutting on Puget Sound or from the waters of Puget Sound below the line of low tide, or have them in their possession, if the same have been taken for the purpose of canning or selling, between the first day of April and the first day of September of each year: Provided, that nothing in this section shall prevent the taking of these clams for consumption of the taker or his family, or guests at all times without a license.” Rem. Code, § 5150-100.

It is contended by appellant, first, that the statute has no application here for the reason that the clams were dug and taken from tide lands by the owner of such lands, who, by reason thereof, had the unqualified ownership of the clams which were sold to the appellant, and that the statute in nowise affected or restricted the rights of private ownership of clam beds in tide lands abutting on Puget Sound; second, that, if the statute applies to the facts of this case, then it contravenes § 1 of the fourteenth amendment to the

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constitution of the United States, as it also does § 3, art. 1, of the constitution of the state of Washington, and is therefore void.

The first proposition urged is without merit. The language of the statute is plain and comprehensive. It makes unlawful the taking or digging of clams, during the closed season, by *any* person from *any* of the tide lands abutting on Puget Sound, or from the waters thereof below the line of low tide. Tide lands are lands which in their natural state are affected by the ebb and flow of the tide. They are not divested of their classification or character as such by the mere fact that title thereto may have passed from the sovereign to the individual. Whatsoever incidents may follow the changed ownership, the fact still remains that they are known and designated as tide lands. There being no exception reserved in the act dependent upon the ownership of the land, it necessarily follows that the legislative enactment by its terms applies to all tide lands abutting on Puget Sound, regardless of whether the title thereto remains in the state or has vested in private ownership.

The second proposition involves a more serious question—whether the restrictions placed by the act upon the property of the individual constitutes a taking of his property within the meaning of the constitutional inhibition, or whether it is merely a regulation of the property right within the valid exercise of the police power of the state. At the outset it may be conceded that, because of the peculiar characteristics of the clam—its fixed habitation when imbedded in the soil—clam beds may become the subject of private ownership which passes to the grantee by a conveyance from the state of tide lands in which the beds are located. Such is the effect of the decisions of this court in *Sequim Bay Canning Co. v. Bugge*, 49 Wash.

127, 94 Pac. 922, and *Palmer v. Peterson*, 56 Wash. 74, 105 Pac. 179. In this respect clams differ from fish, game birds and game animals in their wild or natural state. The landowner acquires no vested ownership in the latter, but the state may regulate and control the subject by virtue of its sovereign power. Since the state, by reason of the private ownership of the individual, has been divested of its ownership of clam beds in tide lands conveyed by the state, its power to regulate the industry or to restrict the rights of the landowner in the use and enjoyment of his property must necessarily depend upon whether it may do so by virtue of the police power with which the state is vested; that is to say, whether the statute, as applied to private ownership, is a lawful exercise of the police power. It will be observed that the gist of the offense defined by the statute is the taking or digging of clams for the purpose of canning or selling, or having clams so taken or dug in one's possession, between the first day of April and the first day of September of each year. This is the only restriction placed upon the property right of the landowner. It neither takes nor destroys his property; it merely regulates the use of it in the interest of the general welfare by conserving a valuable food product, as we shall presently see. Provision is expressly made that he may take for his own use or for the use of his guests at all times. The sole question then is whether the legislative enactment which prevents the owner from digging and taking his clams for the purpose of selling or canning them during the prescribed period, deprives him of his property without due process of law.

It seems to be settled that courts will take judicial notice of scientific facts and natural laws which are well known and which may be found in encyclopedias, dictionaries or other standard publications treating of

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the subject. 15 Ruling Case Law, page 1127, and cases cited. And scientists have demonstrated that the spawning season of clams extends throughout the latter part of May, the whole of June, and in many cases during the entire summer. The larvae are active and swim freely upon the surface of the water, where they are borne and scattered in all directions by the winds and tides until in a few days, the shells becoming heavier, they sink to the bottom and, resting on sea weeds, stones or other objects, become attached by byssus threads. Soon after they cease swimming they begin to burrow, if a suitable location is found. The Encyclopedia Americana, Subject Clam. Nelson's Encyclopedia, Subjects Mussel and Clam. Observations on the Soft Shell Clam by Meade and Barnes (Brown University Contributions from the Anatomical Laboratory, Vol. 4, 1905).

In the light of these facts, established by scientific research, it manifestly appears that the taking or digging of clams for commercial purposes during the period of embryo development would seriously interfere with nature's process of propagation; hence it is reasonable to assume that the legislation was enacted for the purpose of promoting the general welfare by conserving and increasing a useful and valuable food supply. The effect of the statute is merely to prevent a private owner from so using his property as to interfere with or trench upon the corresponding ownership and rights of others, including the public.

In *State ex rel. Case v. Howell*, 85 Wash. 281, 147 Pac. 1162, Judge Ellis, delivering the opinion of the court said:

"It may be asserted, as a general rule, applicable to every phase of the police power, whether emergent or not, that, when the propriety of its exercise is called in question, the power will be sustained whenever the

given measure has any 'real substantial relations to the general good and welfare.' "

In *State v. Pitney*, 79 Wash. 608, 140 Pac. 918, Ann. Cas. 1916A 209, the court, speaking through Judge Main said:

"In determining whether the provisions of a law bring it within the police power, it is not necessary for the court to find that facts exist which would justify such legislation. If a state of facts can reasonably be presumed to exist which would justify the legislation, the court must presume that it did exist and that the law was passed for that reason. If no state of circumstances could exist to justify the statute, then it may be declared void because in excess of the legislative power."

This is but an application of the elementary principle that every reasonable presumption should be indulged in favor of the constitutionality of legislation.

In *Thorpe v. Rutland & B. R. Co.*, 27 Vt. 140, 62 Am. Dec. 625, Chief Justice Redfield used the following forceful language which is approved by Judge Cooley in his valuable treatise on Constitutional Limitations:

"The police power of the state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons and the protection of all property within the state. According to the maxim, *Sic utere tuo ut alienum non laedas*, which being of universal application, it must of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others. . . . There is also the general police power of the state, by which persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the state, of the perfect right, in the legislature to do which no question ever was, or, upon acknowledged general principles, can ever be made, so far as natural persons are concerned."

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Judge Story, in his work on the Constitution, at § 1954, vol. 2 (5th ed.), says:

“All the property and vested rights of individuals are subject to such regulations of police as the legislature may establish with a view to protect the community and its several members against such use or employment thereof as would be injurious to society or unjust toward other individuals. It has been justly said to be ‘a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property . . . is held subject to those general regulations which are necessary for the common good and general welfare;’ and ‘it must of course be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others.’ ”

Measured by these definitions of the police power, we are of the opinion that the act in question, as applied to private owners of clam beds in tide lands abutting on Puget Sound, is not unconstitutional. Let it be remembered that property in clams is not the result of human effort or industry; such property is acquired by the uncontrolled forces of nature. It cannot be said, therefore, to be unreasonable to so regulate the use and enjoyment of this manna-like possession by a private owner as to conserve the interest, not only of the public, but of the private owner as well. He is not deprived of his property by the act in question. His right to enjoy it is merely suspended during the reasonable closed season prescribed by the statute. *In re Opinions of the Justices*, 103 Me. 506, 69 Atl. 627, 19 L. R. A. (N. S.) 422.

Nor are we without authority to sustain the correct-

ness of the application of the doctrine to the facts of this case. In *Windsor v. State*, 103 Md. 611, 64 Atl. 288, 12 L. R. A. (N. S.) 869, the court had before it a statute which provided that any person who shall have oysters in his possession which contained more than five per cent of shell or which shall be less than two and one-half inches from hinge to mouth, shall be guilty of a misdemeanor and subject to a fine. After carefully considering the question, it was held that the act applied to planted oysters taken from private beds in the waters of that state as well as to oysters taken from natural beds or bars, the court being of the opinion that the act was a valid exercise of the police power in that it tended to preserve a source of food supply. In *State v. Sermons*, 169 N. C. 285, 84 S. E. 337, the supreme court of North Carolina said:

"It is chiefly urged for defendant that a conviction should not be had in this instance because it appears that the dealer had procured the oysters from an individual owner of the oyster grounds; but the statute makes no such exception, and we are not aware of any principle sustaining the position. The provision establishing a closed season and requiring dealers to operate only under a regular license are among the usual methods of regulating the industry, and it is well understood that the rights of individual owners are subject to reasonable state regulations affecting their interests."

The judgment will be affirmed.

ELIIS, C. J., FULLERTON, MAIN, and PARKER, JJ.,
concur.

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Syllabus.

[No. 14601. Department One. April 26, 1918.]

CHARLES BOOKHOUT, *Respondent*, v. GEORGE P. VUICH,
Appellant.¹

EVIDENCE.—PAROL EVIDENCE—EXPLANATORY OF WRITING—UNCERTAINTY. A written contract employing a farm laborer to work for a one-third share of the crops, increase of the live stock on the place, and profits from the chickens and eggs, the employer to furnish everything but labor, is so vague and uncertain as to admit of proof by parol explanatory of the writing that the employer agreed to furnish a certain amount of live stock, where it appears that there was no live stock or chickens on the place at the time the contract was made.

SAME—PAROL EVIDENCE TO VARY WRITING—REFORMATION. Where a written contract is so vague and uncertain as to admit of proof of a contemporaneous oral agreement explanatory of the terms of the writing, it is not necessary to reform the writing in order to construe it accordingly.

MASTER AND SERVANT—CONTRACT OF EMPLOYMENT—BREACH—TERMINATION OF RELATION. Where the employer of a farm laborer, to be paid by a one-third share of the crops, increase of live stock, and profits from the sale of chickens and eggs belonging to the employer, failed to furnish any live stock or chickens, the employee could rescind and recover for his services as though he had been actually dismissed from service.

SAME—CONTRACT OF EMPLOYMENT—CONSTRUCTION. The relation of master and servant is created by a contract whereby plaintiff was employed to farm and live on defendant's premises, defendant agreeing to "pay" plaintiff one-third of the crops, increase of live stock, and profits from the sale of chickens and eggs and furnish everything except labor, the plaintiff agreeing to devote all his time to the work, and as much as possible to clearing, and to obey all orders of the defendant.

SAME—CONTRACT OF EMPLOYMENT—BREACH—MEASURE OF DAMAGES. In such a case, on defendant's breach of the contract by failing to furnish live stock and chickens, and rescission by plaintiff, making proof of prospective earnings a matter of guesswork, plaintiff may recover the reasonable value of his services up to the time of the termination of the relation.

¹Reported in 172 Pac. 740.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered June 2, 1917, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

F. A. McMaster, for appellant.

Roche & Onstine, for respondent.

PARKER, J.—The plaintiff, Bookhout, commenced this action in the superior court for Spokane county, seeking recovery of wages upon *quantum meruit* for labor performed by him for the defendant, Vuich, upon his farm in Spokane county. The plaintiff claims he is entitled to have the amount of his recovery so measured because of the breach of a contract of employment by which he was to work upon the defendant's farm and receive as compensation therefor shares in the crops and produce and in the increase of the live stock to result from his labor upon the farm, during the period from August, 1915, to November, 1916. Trial before the court sitting without a jury resulted in findings and judgment in favor of the plaintiff substantially as prayed for, from which the defendant has appealed to this court.

Appellant, the owner of the farm, is engaged in business and resides in the city of Spokane. The respondent is a farmer, fairly intelligent, and can speak and understand the English language, though he cannot read or write. In August, 1915, appellant employed respondent to work upon the farm, to assist in harvesting and caring for the crops produced thereon during that year. Soon thereafter they entered into an oral agreement by which it became understood between them that respondent would continue to work upon the farm for appellant until November, 1916, and receive as compensation therefor shares of the crops and

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produce and of the increase of the live stock to be placed thereon by appellant. It was then understood between them that their contract should be reduced to writing; this was not done, however, until later, though respondent then went to work upon the farm and continued to work thereon until June 15, 1916, when he quit work, the cause of which we shall presently notice. After repeated efforts on the part of respondent to have the contract drawn up in writing, appellant caused it to be prepared and presented to respondent for signing in March, 1916. It was then read to respondent, and he apparently understood it as well as would ordinarily be expected of a person of his limited learning. To the end that the real relations of the parties may be understood, it seems necessary to here notice all the terms of the written contract; we therefore quote it in full as follows:

“This indenture made this 1st day of March, 1916, by and between George P. Vuich, party of the first part, (second) and Charles Bookhout, party of the second part (first).

“Whereas, the said party of the first part is the owner of the south half (S $\frac{1}{2}$) of the southwest quarter (SW $\frac{1}{4}$) of section twenty-six (26), twp. twenty-three (23) range forty-five (45), Spokane county, Washington, and has employed the party of the second part to farm the said premises and to live thereon, occupy the same for a period beginning with the 19th day of August, 1915, to the 1st day of November, 1916, and in consideration of the party of the second part performing the work necessary on the said premises, to plow, till, sow, harvest and haul to market the crops to be raised thereon, and perform the work in connection therewith in a careful and husbandlike manner, it is agreed that the party of the first part will pay to the party of the second part for such labor and services, one-third ($\frac{1}{3}$) of all crops that are to be raised upon the said premises; that the party of the first part is

to provide and furnish the necessary horses, tools, implements and machinery with which to do the work on the said farm, and it is further agreed that the party of the second part shall have one-third ($\frac{1}{3}$) of the increase of all live stock that may be on the said premises belonging to the party of the first part, and one-third ($\frac{1}{3}$) of the profits arising from the raising of chickens and the sale of eggs.

"It is further agreed that the seed necessary for the sowing for the year 1916 shall be furnished by the party of the first part without expense to the party of the second part, and that thereafter there shall be retained a sufficient amount of grain to feed all livestock upon the said premises and to provide a sufficient amount of seed for the following year.

"It is further agreed that the party of the second part is to devote all of his time upon the said premises, and that if it becomes necessary to employ additional help that such help shall be paid for out of the grain which is to be sold belonging to both parties, and after such expense has been deducted, then the balance shall be divided between the parties as above stated, and that the party of the second part agrees to haul all the grain to be sold to the Town of Rockford and deliver to the party of the first part, two-thirds ($\frac{2}{3}$) of the vegetables raised in Spokane and that the delivery of said grain and products shall be without expense to the party of the first part; it being fully agreed between the parties hereto that the party of the second part is to receive no compensation for his labor except as above stated.

"It is further agreed that the party of the second part will devote what time he can in cutting wood upon the said premises and is to have one-third ($\frac{1}{3}$) of all wood that is cut for his services, and also in consideration thereof, he is to perform what labor he can in the clearing of the said land in pulling stumps, the clearing of brush and the burning of same, which is all to be done without expense to the party of the first part, except first party is to hire one man to assist.

"It is further agreed that the second party shall keep the fences upon the said premises in good repair,

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performing all labor necessary to be performed without expense to the party of the first part, but that the party of the first part is to furnish all material necessary in connection therewith, and that the party of the second part agrees to perform all and every work on said farm in a suitable and proper manner, and at a seasonable time, and shall obey instructions and orders from the party of the first part in connection with said labor.

“And at the expiration of said term, the said party of the second part will peaceably quit and surrender the said premises in as good state and condition as reasonable use and wear thereof will permit.

“In witness whereof, the parties to these presents have hereunto set their hands and seals, the day and year first above written.

“(Signed) George P. Vuich

his

“Charles X Bookhout”

mark.

This contract, it will be noticed, relates back to the time of the oral agreement of the parties made in August, 1915, and manifestly was intended to evidence the contract then made, rather than one made at the time of the signing of the writing. While the written contract provides that respondent was entitled to have one-third of the increase of the live stock and one-third of the profits arising from the raising of chickens and sale of eggs, etc., the fact is that there were no live stock or chickens upon the farm when respondent went there in August, 1915, nor when the contract was reduced to writing in March, 1916, nor were any live stock or chickens upon the farm at any time during the term specified in the contract, other than some work horses from which it was not contemplated that there would be any increase, and to which, manifestly, the contract had no reference in so far as the increase of live stock is concerned. Respondent insists that it was understood that appellant was to furnish and put upon

the farm three brood mares with a view to having them produce colts before the expiration of the term; also, forty hogs, six milch cows, and eight hundred chickens, one-third of the increase of all of which the respondent was to have, as well as one-third of the profits arising from the sale of milk, butter, eggs and other produce and crops resulting from his labor on the farm. On June 15, 1916, respondent, up to that time having in all things complied with the contract on his part, and having performed much labor upon the farm resulting to the benefit of appellant, quit work because appellant had neglected to furnish or place upon the farm any brood mares, cows, hogs or chickens. Up to this time respondent had received practically no compensation, evidently because there had not been, and ordinarily would not be, any returns from the working of the farm up to that time. Thereafter respondent commenced this action seeking recovery, as we have already noticed.

Respondent prayed for reformation of the written contract so that it would in terms require appellant to furnish and place upon the farm brood mares, cows, hogs, and chickens in number as claimed by respondent was agreed upon in the fall of 1915. This apparently was intended to be an alternative claim to that of the right to introduce oral evidence to show such to be the meaning of the contract as written. While the trial court, in its findings, in effect decided that the contract should be so reformed, it ignored the question of reformation in the entering of its final judgment, manifestly proceeding upon the theory that the written contract was sufficiently ambiguous on the question of appellant furnishing live stock and chickens to admit oral evidence of what the contract was in that respect, in effect deciding that the meaning of the written contract, in the light of the situation of the parties, was

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as claimed by respondent in that respect, and deciding that the failure of appellant to so furnish live stock and chickens justified respondent in quitting work and rescinding the contract on June 15, 1916, that being past a reasonable time for the furnishing of live stock and chickens as agreed upon. The evidence is all but conclusive that the amount of recovery awarded to respondent by the trial court, if his recovery can be measured by reasonable wages, is proper in amount. Let us remember as we proceed that respondent is not claiming, and that he was not awarded, recovery for anything but his work rendered up to the time of his quitting work. He is not seeking damages for loss of prospective earnings thereafter.

It is contended in appellant's behalf that the superior court erred in receiving oral evidence of the understanding had between the parties as to the furnishing and placing of live stock and chickens upon the farm by appellant. This contention is rested upon the theory that such evidence violated the rule excluding oral evidence tending to vary or contradict the terms of a written contract. It seems to us, however, that a reading of this contract as a whole, in the light of the situation of the parties, shows that this evidence neither varies nor contradicts the terms thereof, but only explains and renders effective the contract in so far as it provides that respondent should have as part of his compensation one-third of the increase of the live stock and one-third of the profits arising from the raising and sale of chickens and eggs. It seems plain that respondent was not to furnish anything but his labor, while appellant was to furnish everything else necessary to the carrying on of the farm as contemplated by the terms of the contract. We think the contract is, in any event, sufficiently vague and uncertain as to the furnishing of live stock and chickens by ap-

pellant to entitle respondent to prove by oral evidence what the contract actually means or was intended to mean in this respect. We conclude that, in view of this vagueness and uncertainty in the terms of the contract and the peculiar situation of the parties, the trial court did not err in receiving oral evidence with a view to interpreting those provisions of the contract which provide for respondent receiving one-third of the increase of the live stock and the profits arising from the raising and sale of chickens and eggs. Our decision in the late case of *Holland-North America Mortgage Co. v. Masters*, 94 Wash. 542, 162 Pac. 995, is in harmony with this view. We do not think our still later decision in *Thompson & Stacy Co. v. Evans, Coleman & Evans*, 100 Wash. 277, 170 Pac. 578, expresses any view of the law to the contrary. Being of the opinion that the oral evidence was admissible because of the vagueness and uncertainty of the terms of the contract, it was unnecessary to reform the contract before it could be given the meaning contended for by respondent. *Roberts v. Stiltner*, ante p. 397, 172 Pac. 738.

It is next contended in appellant's behalf that the written contract and the oral evidence received in interpretation thereof do not warrant the conclusion that appellant was to furnish live stock and chickens as claimed by respondent. There may be fair room for arguing that the contract between the parties did not call for the furnishing of live stock and chickens for the year 1916 to the extent in numbers as claimed by respondent, since it could be fairly argued from the evidence that the talk between the parties touching that matter in some measure had reference to the furnishing of some live stock and chickens after 1916, it being thought possible that the employment of respondent upon the farm might continue after 1916, though no agreement to that effect was entered into.

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However, we need not seriously concern ourselves here with the exact measure of appellant's duty as to furnishing live stock and chickens for the year 1916. We are here concerned with his duty only to the extent of determining whether he was to furnish some substantial quantity of live stock and chickens to the end that there would be an increase thereof and profit resulting therefrom during the term of this contract. If appellant was so obligated and failed in this respect, it does not matter that he was not obligated to furnish as large a quantity of live stock and chickens as respondent claims he should have furnished during the term of the contract. We have read the evidence with care, as furnished to us in the abstracts prepared by counsel, and are convinced that there was a substantial failure on the part of appellant to furnish live stock and chickens as agreed by him such as to fully warrant respondent in rescinding the contract and quitting work on June 15, 1916, because of such failure. That respondent would be entitled to rescind the contract and recover for a breach thereof of this nature, the same as if appellant had actually dismissed him from service and put him off the farm, seems clear as a proposition of law. 3 Sutherland, Damages, § 692.

It is finally contended in appellant's behalf that the trial court erred in measuring the amount of respondent's recovery by the reasonable value of his labor during the period he worked upon appellant's farm, that is, from August, 1915, to June 15, 1916, when he quit work, the trial court having measured the recovery by the customary wages per month for such work during that period. The argument is, in substance, that, if respondent was entitled to recover at all, it would be in damages measured by the loss of his prospective earnings, if any he could prove, by reason of his having been prevented from completing his term of service as

provided by the contract. This, it seems to us, calls for a careful noticing of the real relation of the parties and the manifest uncertainty and practical impossibility of proving prospective earnings with any degree of certainty, which uncertainty results from the fault of appellant in failing to furnish live stock and chickens.

Recurring to the contract, we find prominent therein these features: (1) Appellant "employed" respondent "to farm the said premises and to live thereon" for the period specified; (2) Appellant agreed that he would "pay to" respondent "for such labor and services" one-third of the crops, one-third of the increase of the live stock, and one-third of the profits arising from the raising and sale of chickens, eggs and other produce; (3) Appellant agreed to provide everything necessary to that end except labor, while respondent agreed to furnish his labor only; (4) Respondent, by the express terms of contract, was to "devote all his time upon said premises"; (5) Respondent was to labor as he might find time in clearing the uncleared portion of the land; (6) It was agreed that respondent should "perform all and every work on said farm in a suitable and proper manner, and in a reasonable time, and shall obey instructions and orders from the party of the first part (appellant) in connection with said labor." We note these features of the written contract to the end that it may be made plain, as we think they do, that it was a contract of employment creating the relation of master and servant, rather than that of landlord and tenant or landlord and cropper.

The views of the courts are seemingly not in harmony touching the legal relation of parties to farming contracts where the tenant, cropper or employee receives a share of the crop or a share of the proceeds thereof as his profit or compensation. This seeming conflict,

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however, arises largely out of the varying situations in which the parties find themselves by reason of the peculiar terms of such contracts in the different cases where they have been considered. See 8 R. C. L. 373. Counsel for appellant invokes the general rule that damages for breach of a contract are to be measured by the loss of the value of the advantage or profit that would result to the party so damaged which he would have if the contract were not breached and he had the opportunity of completing it and reaping the advantage and profit it would give him. We may concede this to be the rule as held by most of the authorities, even as to pure employment contracts where the contract itself furnishes a certain measure of damages, as where the employment is for a specified time at a specified lump sum, or where the compensation is determinable in a lump sum with some fair degree of certainty. In such cases it seems to be the rule that the party injured by the breach of the contract preventing him from completing his service as contracted for entitles him to recover, not the reasonable value of the service he may have rendered, but the value of the service so rendered measured by a proportionate value of the whole service at the whole contract price, and also for loss of future earnings which the employee suffers by the breach of the contract which terminates his service. However, when the contract is one of employment only, and the total compensation agreed upon is as uncertain as under this contract, and the breach by the employer renders proof of prospective earnings by the employee under the contract almost wholly a matter of guess-work, we think the employer is not in position to object to the measuring of recovery by the employee by the reasonable value in wages of services actually rendered to the employer's benefit.

The early decision of this court in *Noyes v. Pugin*, 2 Wash. 653, 27 Pac. 548, is of interest in this connection. That case involved a contract between an owner and an architect for the services of the latter looking to the drawing of plans and the construction of a building. The contract was, in substance, that the architect was to be compensated by a certain percentage of the cost of the building to be constructed. The architect having prepared the plans, the owner breached the contract by declining to permit the architect to proceed. He sought recovery, and it was held that the measure of his recovery was not the reasonable value of his services, but the value of his services to the extent they were rendered in proportion to the entire service to be rendered and the entire contract compensation. While in that case there was no specified fixed amount that the architect was to receive for his entire services, there was manifestly a basis upon which the entire amount could be computed and determined with a fair degree of certainty; that is, the contract itself furnished a fairly certain measure of the damages for its breach, because the amount of the entire cost of the building was understood with a fair degree of certainty at the time of the making of the contract. It was upon this theory that the court held the architect was not entitled to the recovery measured by the reasonable value of his services. It was observed by Chief Justice Anders, writing the opinion, at page 660, that:

“It was not shown in this case that it was impracticable to apportion the value of plaintiff’s services according to the rate of compensation claimed to have been stipulated for, and we are therefore of the opinion that the court below should have instructed the jury that, if they found that the plaintiff performed the services claimed to have been rendered by him under a contract specifying the price to be paid for doing the

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whole work agreed to be done by him, the measure of his recovery would be such a proportion of the contract price as the work done bore to the whole work embraced by the terms of the agreement, and that the failure to so instruct was error."

In *Chase v. Smith*, 35 Wash. 631, 77 Pac. 1069, we have a somewhat similar situation. There a painter was to paint a certain number of houses for a specified lump sum; the owner was to furnish a certain part of the material and the painter to furnish a certain part of the material. Upon a breach of the contract by the owner, as in the *Noyes* case, it was held that the painter was not entitled to recover the reasonable value of his services, but the value of his services measured by the contract price as a whole. In *Gabrielson v. Hague Box & Lumber Co.*, 55 Wash. 342, 104 Pac. 635, 133 Am. St. 1032, some observations are made indicating the view of the court that, upon a breach of a labor contract by the employer, the employee may, if he so elects, sue upon *quantum meruit* and recover the reasonable value of his labor, citing the *Noyes* and *Chase* cases above noticed. This observation is, of course, subject to qualification as applied to varying circumstances, but it is some indication, read in the light of the *Noyes* and *Chase* cases, of the view of the court favorable to respondent's contentions in this case. Now, in the case before us, we think it is readily to be seen that there is no measure other than one of pure guesswork of what would be the amount of respondent's recovery if he is compelled to look only to his prospective earnings under the contract, in so far as his earnings from the increase of the live stock and that resulting from the raising and sale of chickens and eggs are concerned, and it seems plain that this was to be a very large part of his earnings within the contemplation of the parties

to the contract. This, we think, is wherein this case differs materially from the *Noyes* and *Chase* cases above noticed.

Under all the circumstances here shown, we are constrained to hold that, since the relation between respondent and appellant was that of employer and employee, since the amount of respondent's recovery would be so uncertain by the adoption of the measure insisted upon by appellant, since respondent was placed in this position by the fault of appellant, and since respondent is seeking recovery for past services only, we think appellant should not be heard to object to the measuring of respondent's recovery by reasonable wages for the work actually performed to his benefit. We think it would not be profitable or enlightening to here review the numerous decisions dealing with farm contracts.

The judgment is affirmed.

ELLIS, C. J., WEBSTER, MAIN, and FULLERTON, JJ.,
concur.

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Syllabus.

[No. 14642. Department Two. April 26, 1918.]

WILLIAM R. ARMSTRONG, *Respondent*, v. SPOKANE
INTERNATIONAL RAILWAY COMPANY, *Appellant*.¹

APPEAL—DISMISSAL—DELAY IN FILING RECORD. An appeal will not be dismissed for failure to file the record within the time provided by law when the fault was due to the custom of allowing the transcript to remain in the office of the clerk of the court for the use of the adverse party, and to the oversight of the clerk in failing to forward it in time, and the delay was minimized by advancing the cause on the docket of the supreme court.

SAME—NOTICE—PARTIES TO BE SERVED—SURETIES ON COST BOND—WAIVER. Failure to serve notice of appeal upon the sureties upon respondent's cost bond is not ground for dismissal of the appeal, where the appellant files a waiver of any claim against the cost bond and the sureties thereon.

DAMAGES—PERSONAL INJURIES—SPECIAL DAMAGES—LOSS OF EARNINGS BY FARMER—PLEADING. In an action for personal injuries sustained by a farmer operating his own lands and other lands under leases, it is not admissible, under a complaint claiming damages "to his person" in a specified sum, to permit the plaintiff to testify that his earning capacity in overseeing his farm work and leases was \$1,500 a year, and as to his losses on account of the necessity of giving up his work and leases; since the losses were not the direct, natural and necessary result of the injury, but were due to special circumstances and conditions not implied by law or recoverable unless specially alleged.

APPEAL—REVIEW—CURE OF ERROR—EVIDENCE—INSTRUCTIONS. In an action for personal injuries, error in admitting evidence of special damages from loss of earning power in plaintiff's business which was not specially alleged, is not cured by instructions to the jury on the measure of damages, limiting plaintiff's recovery to the amount which the jury find will "fairly and honestly compensate him for the personal injuries he himself sustained, if any"; since it did not specify the items of damages to be eliminated nor exclude the objectionable evidence from the jury's consideration.

PLEADING—AMENDMENT—TO CONFORM TO PROOF—WAIVER OF OBJECTION. A complaint for personal injuries failing to allege special damages cannot be deemed amended to conform to proof of special damages at the trial, where the evidence was duly objected to, and the error is not waived by failing to claim a surprise and ask a continuance, in the absence of offer of amendment.

¹Reported in 172 Pac. 578.

Appeal from a judgment of the superior court for Spokane county, Oswald, J., entered March 2, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained through a collision with a train. Reversed.

Allen, Winston & Allen, for appellant.

John Pattison and Smith & Mack, for respondent.

ELLIS, C. J.—This is an action for personal injuries. The facts briefly are these. Defendant's railway tracks cross Napa street, in the city of Spokane, at its intersection with Broadway. Plaintiff, at about 8:30 o'clock on the evening of July 22, 1916, was driving his automobile north on Napa street. At the crossing of these tracks a collision occurred between his automobile and the rear end of one of defendant's trains, destroying the automobile and causing the injuries to plaintiff of which he complains. The negligence alleged was backing the train through a cut onto the crossing at a high rate of speed with no lights on the rear end, it being dark, and without giving notice or warning of its approach. Defendant admitted the collision and the destruction of the automobile, denied any negligence on its part and alleged contributory negligence on plaintiff's part. At appropriate times defendant moved for a nonsuit and for a directed verdict. These motions were denied. The jury returned a verdict in plaintiff's favor for \$2,600. Defendant moved for judgment *non obstante veredicto* or, in the alternative, for a new trial. These motions were also denied. Judgment was entered on the verdict. Defendant appeals.

Respondent has moved to dismiss the appeal on two grounds: First, that appellant failed to file the record within the time provided by law; second, that it failed to serve notice of appeal upon the cost bond sureties.

As to the first ground, we think a sufficient excuse was shown. It appears that it was the custom in Spokane county to allow the transcript and statement of facts to remain in the office of the clerk of the court for the use of the adverse party in the preparation of his brief, the clerk being instructed to forward all papers to this court when the briefs have been prepared and filed. The transcript and statement of facts were so filed well within the time, but when respondent had prepared his brief, the clerk, apparently through an oversight, failed to forward the record to this court. While the error may have caused some delay, the cause was advanced on the docket of this court for one term, thus minimizing such delay. As to the second ground, it is sufficient to say that appellant has filed in this court a written waiver of any claim against the cost bond and the sureties thereon. The motion to dismiss is denied.

Appellant has advanced several claims of error, but we find it expedient to discuss only one of them except in a general way. The evidence was voluminous and sharply conflicting. We have considered it with much care, but the conclusion which we have reached makes unnecessary an extended statement. We are satisfied that there was ample evidence to take the case to the jury upon the questions of appellant's negligence and respondent's contributory negligence.

Error is assigned upon the failure of the court to give certain instructions requested by appellant. We have considered them carefully in connection with all of the instructions which were given. We find that, in so far as they were proper at all, they were fully covered in every material particular by the instructions which were given. No exceptions were taken to the instructions given by the court. They sufficiently covered the case as presented in every particular save one, to which we shall hereafter advert.

Touching his loss of time, earnings and earning capacity, respondent was permitted to testify that he was a farmer operating his own land and certain leaseholds, and further:

“Q. What was your earning capacity per annum prior to this accident? Mr. Winston: I object on the ground that it is incompetent and immaterial, not within any of the issues in the pleadings, there being no allegations in the complaint of loss of earning capacity. Thereupon the objection was overruled, and it was agreed that defendant need make no further objections to this line of testimony. A. My earning capacity was about \$1,500 per year. After the injury I had to get a man. He hitched my team to a binder and it ran away, so I had to hire all my cutting done, and I disposed of my threshing rig because I was not able to take care of it; I gave up the leases because I was not able to work and oversee them; all this on account of my injuries.”

Appellant contends that this evidence was inadmissible, in that it tended to prove an element of special damage of which there was no allegation in the complaint. Respondent insists that it was admissible in proof of general damages necessarily resulting from the injury, and that, in any event, its admission, if error, was cured by an instruction.

It is undoubtedly the law that a plaintiff, under a general allegation of damages, may recover all such damages as are the natural and necessary result of such injuries as are alleged, for the law implies their sequence. 2 Sutherland, Damages (4th ed.), § 418. But not every loss which may result from the injury is a natural and necessary result of the injury. Injury to business as such, loss of business profits as such, loss of contemplated contracts or profits thereon are special damages. Where capable of proof at all, they can only be proved under an allegation of the specific facts showing such special damages, and then only by

competent evidence that they resulted from the injury and not from other causes. We attempted to point out this distinction and mark the limits of legitimate proof in the recent case of *Singer v. Martin*, 96 Wash. 231, 164 Pac. 1105, which is cited by appellant. In that case, however, the plaintiff in his complaint alleged that he had been "compelled to neglect his business for over a month." We held that this allegation was sufficient to warrant proof of damages for loss of time or loss of personal earnings, but not damages for injury to business as such, nor for loss of business profits as such. The plaintiff was permitted to introduce evidence of his loss of business profits as such, and the court instructed that he could recover for loss to business. For this error, the judgment was reversed. But we did not hold that the allegation of loss of time and of personal earnings was a necessary allegation to a recovery for such loss. We merely remarked that there was such an allegation in the complaint there involved.

In the case of *Horton v. Seattle*, 61 Wash. 301, 112 Pac. 366, we intimated, without deciding, that evidence of loss of earning capacity was inadmissible under a complaint which failed to allege such loss, but held that the evidence there admitted was little more than an incidental reference to such loss, not followed up by any attempt to prove any loss of time, hence was not prejudicial. We have been cited to no decision of this court directly passing upon the question here involved, and recall none. The decisions from other jurisdictions are hopelessly divided. Many courts hold that damage through loss of time, impaired earning capacity or interference with work, are such necessary results of personal injury as to be capable of proof without being specifically pleaded, especially

when the disability is total or the injury permanent. For examples see: *Murdock v. New York & B. Dispatch Express Co.*, 167 Mass. 549, 46 N. E. 57; *Palmer v. Winona R. & Light Co.*, 83 Minn. 85, 85 N. W. 941; *Terre Haute Elec. Co. v. Watson*, 33 Ind. App. 124, 70 N. E. 993; *Missouri, Kan. & Tex. R. Co. v. Johnson* (Tex. Civ. App.), 37 S. W. 771; *Bailey v. Centerville*, 108 Iowa 20, 78 N. W. 831. Others, perhaps a greater number, hold that such damages are to be regarded as special, provable only when specifically averred. For examples see: *Union Traction Co. of Indiana v. Sullivan*, 38 Ind. App. 513, 76 N. E. 116; *Mellor v. Missouri Pac. R. Co.*, 105 Mo. 455, 16 S. W. 849, 10 L. R. A. 36; *Farrington v. Cheponis*, 82 Conn. 258, 73 Atl. 139; *Chesapeake & O. R. Co. v. Crank*, 128 Ky. 329, 108 S. W. 276, 16 L. R. A. (N. S.) 197; *Irving v. Stevensville*, 51 Mont. 44, 149 Pac. 483; *Illinois Cent. R. Co. v. Beeler*, 142 Ky. 772, 135 S. W. 305; *Fitchburg R. Co. v. Donnelly*, 87 Fed. 135.

But whatever may be the correct rule in case of injuries to laborers, ordinary mechanics and the like, whose earnings may be said to be standardized and hence presumably known to the other party without averment (*Stowe v. La Conner Trading & Transp. Co.*, 39 Wash. 28, 80 Pac. 856, 81 Pac. 97), it seems to us that the rule last above noted should apply in cases where the value of lost time or lost earnings of the injured person are dependent upon peculiar conditions. When the consequences of an injury are peculiar to the circumstances, condition or affairs of the injured person, the law cannot imply damages simply from the act causing the injury. *Tomlinson v. Derby*, 43 Conn. 562, 567. Loss of earnings in a special employment, business or profession, or from any peculiar condition of the injured person, therefore cannot be proved with-

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out being alleged. For illustrative cases see: *Luessen v. Oshkosh Elec. L. & P. Co.*, 109 Wis. 94, 85 N. W. 124; *Rush v. Metropolitan St. R. Co.*, 157 Mo. App. 504, 137 S. W. 1029; *Hart v. Metropolitan St. R. Co.*, 121 App. Div. 732, 106 N. Y. Supp. 494; *Uransky v. Dry-Dock, E. B. & B. R. Co.*, 118 N. Y. 304, 23 N. E. 451, 16 Am. St. 759; *Mellwitz v. Manhattan R. Co.*, 17 N. Y. Supp. 112; *Smith v. Whittlesey*, 79 Conn. 189, 63 Atl. 1085; *Baldwin v. Western R. Corp.*, 4 Gray (Mass.) 333; *Heiser v. Loomis*, 47 Mich. 16, 10 N. W. 60; *Joslin v. Grand Rapids Ice Co.*, 50 Mich. 516, 15 N. W. 887, 45 Am. Rep 54; *Louisville & N. R. Co. v. Reynolds*, 24 Ky. Law 1402, 71 S. W. 516.

Respondent was not a mere farm hand. He was a farmer, overseeing the operations on his own land and other lands held by him under leases. The value of his time and the extent of his personal earnings were necessarily dependent on conditions peculiar to himself which could not be anticipated by the appellant. His own testimony made this plain. Appellant was entitled to notice not only of the extent of his claim of damages, but for what the damages were claimed. In this respect the complaint was actually misleading. In it he enumerated certain specific injuries to his person, alleged intense past and present pain and suffering and probable future pain and suffering, and claimed damages "by reason of said injuries to his person" in the sum of \$15,000, and for the destruction of his automobile, \$800. There was not even an allegation of loss of time. Aside from the loss of the automobile, the complaint, fairly construed, was a claim for damages for physical pain and suffering alone resulting from the specified injuries. As said by the supreme court of Florida in *Jacksonville Elec. Co. v. Batchis*, 54 Fla. 192, 44 South. 933:

"If the loss to plaintiff of earnings in her occupation was a direct, natural and necessary result of the injury complained of, so as to be covered by an allegation of general damages, there is no general allegation of damages in excess of the special damages claimed, and such damages are not specifically alleged. Loss of earnings cannot fairly be included in any damages stated and cannot be clearly inferred from any facts alleged in the declaration. The allegations of damage because of injuries and pain and suffering clearly refer to injuries to the person, and not to pecuniary losses. Loss of earnings is not fairly included in or plainly inferable from the allegation of damages for rent paid for plaintiff's place of business which she was compelled to keep closed during her confinement in her room for two weeks. The objection to testimony as to losses by plaintiff of earnings in her occupation should have been sustained in view of the allegations of the declaration."

We are convinced that the allegations of the complaint in the case before us were insufficient soundly to permit the admission of the evidence under discussion for any purpose.

Was the error cured by the instruction of the court touching the measure of damages? We think not. When the court by its instructions either (1) in terms eliminates from consideration specified improperly admitted evidence of special damages, *Gallagher v. Buckley*, 31 Wash. 380, 72 Pac. 79, or (2) in terms confines the recovery to the specific proper items of damages, *McCormick v. Tappendorf*, 51 Wash. 312, 99 Pac. 2, error in the admission of the evidence of the improper items is cured. It will then be presumed that no prejudice has resulted from its admission. But when the instructions neither specify the items of damage to be eliminated nor the items of damage to be included in the jury's consideration, the admission of evidence

of improper items is not cured. In such a case, no court can assume that prejudice did not result. *Chesapeake & O. R. Co. v. Crank, supra*.

"When incompetent evidence is erroneously permitted to go to a jury, and an attempt is subsequently made to withdraw it from their consideration, the direction of the court should be plain and specific—if the harm done is to be avoided. We must not be unmindful of the fact that instructions are addressed to a jury of laymen, not to trained legal minds. The question is not whether the court would have disregarded the offending testimony, but is it certain that the jury has done so." *State v. Albutt*, 99 Wash. 253, 169 Pac. 584.

See, also, *Grays Harbor Boom Co. v. Lownsdale*, 54 Wash. 83, 102 Pac. 1041, 104 Pac. 267. The only instruction which it is claimed excluded this objectionable evidence from the consideration of the jury was insufficient, we think, for that purpose. It reads:

"In the event you find from the evidence that the plaintiff is entitled to recover, then I instruct you that he is entitled to recover only such an amount as you find from a fair preponderance of the evidence will fairly and honestly compensate him for the personal injuries that he himself has sustained, if any, for the damage, if any, to his automobile. You are not at liberty to allow exemplary damages, that is damages by way of punishment or smart money. In the event you find in favor of the plaintiff, then the amount of your verdict cannot exceed the sum of \$15,800 or the sum of \$15,000 for the injuries sustained by the plaintiff, if you find plaintiff to have sustained any injuries, and \$800 for the injury or destruction of plaintiff's automobile, if you find the same to have been injured or destroyed."

It neither, in terms, excluded the objectionable evidence from the jury's consideration nor indicated what items of damages to respondent could properly be considered as resulting from the "personal injuries that

he himself has sustained, if any." On its face the purpose of this instruction was to limit the recovery to compensatory as distinguished from exemplary damages. That, at least, was its salient tendency. The offending evidence having been admitted over the specific objection that it was outside the issues, the jury could only infer that the court held it admissible for the purpose of augmenting the damages. There was nothing in the instruction calculated to remove that impression from the mind of the layman, however intelligent.

This is not a case in which we are at liberty to treat the pleadings as amended to conform to the proof. True we have held that, where a case was tried upon an issue not properly within the pleadings we will treat the pleadings as amended to conform to the proof, but no such case is presented here. This can be soundly done only where the evidence was admitted without objection, or where the objecting party has met the issue with evidence under such circumstances that he may be said to have waived his objection. Any other view would make an objection to improper evidence a useless formality. Nor was appellant required to claim surprise and ask for a continuance. Obviously such a claim and request would have been unavailing. The court had already ruled that the evidence offered was within the issues. The natural response to a claim of surprise would have been that the claim was unfounded, and doubtless, for that reason, a continuance would have been denied. It is only where an amendment is asked and permitted that it is incumbent upon the other party to ask for a continuance on the ground of surprise. It would be an absurdity to hold that an objection to improper evidence to be availing must be fortified by the idle formality of a request for a continuance where no amendment was asked for or made.

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The judgment is reversed, and the cause is remanded for a new trial with direction to permit respondent to amend his pleadings if he so desires.

WEBSTER, MOUNT, HOLCOMB, and CHADWICK, JJ., concur.

[No. 14203. Department One. April 27, 1918.]

W. D. HENDRIX, *Appellant*, v. CORA M. HENDRIX,
Respondent.¹

DIVORCE—VACATION OF JUDGMENT—GROUNDS—EXCUSABLE NEGLECT. A judgment for divorce cannot be vacated on the ground of excusable neglect where the evidence establishes that defendant left the state shortly before the hearing, intending not to return, and to place property in a sister state beyond the reach of the court.

SAME—VACATION OF JUDGMENT—CONDITIONS—DISCRETION. It is discretionary, on application for the vacation of a judgment of divorce upon the grounds of excusable neglect, to impose the condition of defendant's subjecting his property to the jurisdiction of the court and such condition is reasonable where it appears that defendant left the state without complying with orders for suit money and temporary alimony, intending not to return, and to place property in a sister state beyond reach of the court.

APPEAL—RECORD—AFFIDAVITS—STATEMENT OF FACTS. Affidavits used upon application for suit money and alimony cannot be considered on appeal, unless brought up by bill of exceptions or statement of facts.

DIVORCE—DIVISION OF PROPERTY—AWARD—FINDINGS—SUFFICIENCY. In an action for divorce, an award of \$5,250 from property of the defendant is not objectionable because there were no findings as to the resources of the plaintiff wife, or because the award was not warranted by the findings as to defendant's resources, where the findings showed the nonsupport of plaintiff and four minor children, and that defendant was an able-bodied man capable of earning \$135 per month as a railroad man, and was possessed of \$7,000 to \$10,000 worth of real and personal property; as the findings are entitled to a favorable construction in view of reasonable and legitimate inferences.

¹Reported in 172 Pac. 819.

Appeal from a judgment and order of the superior court for Spokane county, Huneke, J., entered November 2, 1916, and January 30, 1917, granting a divorce upon findings in favor of the defendant, and denying an application to vacate the judgment entered thereon, after a hearing before the court. Affirmed.

Tolman, King & Way, for appellant.

F. E. Langford, for respondent.

MAIN, J.—The parties to this action were formerly husband and wife. The plaintiff brought an action against his wife for a divorce. The wife denied the facts in the complaint upon which the divorce was sought and, by cross-complaint, sought a divorce against the plaintiff. A decree was entered in favor of the wife upon the cross-complaint, which provided that she should be paid \$5,000 permanent alimony, \$200 attorney's fee, and \$50 suit money. Sometime after this judgment was entered, the plaintiff made an application for the vacation thereof on the ground of excusable neglect. This application was heard upon affidavits and was denied by the superior court. The plaintiff in the divorce action and petitioner in the application to vacate the judgment appeals both from the judgment in the principal action and from the order denying the application to vacate.

The facts may be stated as follows: During the month of February, 1915, the divorce action was begun. Soon thereafter the respondent applied to the court for alimony *pendente lite*, attorney's fees and suit money. After this application was made, the appellant departed from the state and was absent therefrom a number of months. The action was begun in Douglas county. On August 2, 1916, the respondent served her answer and cross-complaint, together with a mo-

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tion for change of venue to Spokane county. After a hearing upon this motion, the cause was transferred to Spokane county. The motion for temporary alimony, suit money and attorney's fees was then heard, and resulted in an order directing that the appellant pay \$50 on account of attorney's fees, \$25 for suit money, and \$40 per month temporary alimony. At that time the appellant was working for the Great Northern Railway Company and was earning approximately \$135 a month. After this order was entered, the respondent's attorney was advised by the appellant's attorney that the appellant could not make any compliance with the order until his next pay day, which would occur about the 20th of October, following. A few days before this latter date, the appellant departed from the state of Washington and went to the state of California. By written stipulation between the attorneys for the respective parties, the cause was tried on the 2d day of November, 1916, and resulted in a judgment as above indicated. Neither the appellant nor his attorney was present at this trial and the prosecuting attorney appeared in the action. Soon after this judgment was entered, an action was brought thereon in the state of California and the interest of the appellant in his deceased father's estate was attached. After this occurred, the appellant employed attorneys other than the attorney who appeared for him in the divorce action and made the application, as above stated, on the ground of excusable neglect. This application was heard upon affidavits.

The appellant claims, and his affidavit tends to support him, that he departed from the state of Washington with the intention to return thereto and contest the divorce action, and that his attorney failed to notify him of the time when the same was set for trial. The respondent claims, and the affidavits filed in her behalf

show, that the appellant left the state of Washington with the intention of abandoning the action, and that he was going away "for good." There are four affidavits to this effect, any one of the affiants apparently being of equal credibility with the appellant, and one of them being entirely disinterested. The conclusion is irresistible that, when the appellant departed from the state of Washington, he did not intend to return, and that he intended to abandon the action. From the record it is a reasonable inference that he thought he could go to California, receive his interest in his father's estate—which was then ready for distribution—and defeat the collection of any judgment that might be rendered against him in the divorce action. The trial court properly held that the judgment should not be disturbed on the ground of excusable neglect.

At the close of the hearing in the trial court upon the application to vacate, the cause was continued until the 30th day of January, 1917, for the purpose of giving the appellant an opportunity to subject all his property to the jurisdiction of the court and to comply with the order of the court theretofore made; and if this was done, the motion to vacate was to be granted. The appellant declined to comply with the conditions imposed, and the order was entered denying the application to vacate. The opening or vacating of a judgment on the ground of excusable neglect is an act which is discretionary with the trial court, and that court has power to impose such terms as may be just and reasonable as a condition to the granting of the relief, and its judgment will not be interfered with unless there is a gross and manifest abuse of discretion. *Redding v. Puget Sound Iron & Steel Works*, 44 Wash. 200, 87 Pac. 119; *Pringle v. Pringle*, 55 Wash. 93, 104 Pac. 135.

The terms imposed were entirely reasonable and just. There appears to be no good reason why the ap-

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pellant should not subject all of his property to the jurisdiction of the court and comply with the orders of the court previously made. As already indicated, he had not in any respect complied with the order for suit money, alimony *pendente lite* and attorney's fees, and had shown no disposition to comply therewith. Had the trial judge granted the application to vacate without the imposition of the terms mentioned, it is probable, though we do not here decide the question, that his action would have been an abuse of discretion.

We will not consider the appeal from the judgment in the principal action. On this branch of the case, the cause is here to be reviewed upon the findings of fact, conclusions of law and the judgment. There are embodied in the supplemental transcript certain affidavits which were used in the trial court upon the application for temporary alimony, etc. These the appellant moves to strike. This motion must be sustained. By many decisions, which need not here be assembled, it has become the settled doctrine of this court that affidavits used upon a hearing before the trial court cannot be here considered unless by the certificate of the trial judge they are made a part of the record by being included in the statement of facts or a bill of exceptions. It is not sufficient that they may be found in the clerk's transcript.

Upon this appeal it is claimed that the findings are insufficient to sustain the judgment in two respects: (a) That there was no finding as to the resources or necessities of the respondent; and (b) that the award of \$5,250 was not warranted by the court's finding as to the appellant's resources. The findings recite that the appellant and the respondent intermarried in the state of Iowa on March 19, 1890, and lived together as husband and wife until the year 1905, when at Avalon, in the state of Missouri, the appellant abandoned the

respondent and their then four minor children, the result of the marriage; that the appellant failed to support the respondent and the minor children during the ensuing three years, at the end of which time a divorce was granted to the respondent in the state of Missouri; that subsequently, on November 5, 1912, the parties remarried, and with the then minor child, Olive Hendrix, took up a residence at Hillyard, in Spokane county, Washington, where the respondent has since resided; that, from the 5th day of November, 1912, until on or about the 5th day of November, 1913, the appellant neglected the respondent and the minor child and failed to support them; that he indulged in the habits of gambling and drinking, whereby he dissipated most of his earnings; that he remained away from his home at nights without any reasonable excuse; that he neglected to pay the household bills and expenses, and neglected to furnish the respondent and the minor child with suitable raiment and the necessities of life; that, on November 5, 1913, he left his home in Hillyard and abandoned the respondent and the minor child and has ever since lived separate and apart from them; that the appellant is an able-bodied man and capable of earning about \$135 per month at his business as a railroad man; that he is possessed of real and personal property of the value of from \$7,000 to \$10,000, acquired by inheritance; that he has neglected and refused to comply with the order of the court directing him to pay to the respondent \$40 monthly alimony *pendente lite*, suit money and attorney's fees; and that the sum of \$200 was a reasonable attorney's fee to be allowed to the respondent, and the sum of \$50 is a reasonable amount to be allowed her as suit money.

One of the conclusions of law was that the respondent have and recover from the appellant the sum of \$5,000 for the support and maintenance of herself and minor

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child, and the further sum of \$250 for suit money and attorney's fees. The decree entered accords with the findings and conclusions.

Along with the findings must be considered their reasonable and legitimate inferences. Where the findings are susceptible of two constructions, one of which will sustain the judgment and the other defeat it, they will be given that construction which sustains the judgment. *Cantwell v. Nunn*, 45 Wash. 536, 88 Pac. 1023; *Dobrentai v. Piehl*, 92 Wash. 433, 159 Pac. 371; *Burleigh v. Consumers Publishing Co.*, 95 Wash. 49, 163 Pac. 5.

We think the findings in this case sufficient to sustain the judgment.

Affirmed.

ELLIS, C. J., PARKER, WEBSTER, and FULLERTON, JJ.,
concur.

[No. 14352. Department Two. April 27, 1918.]

THE STATE OF WASHINGTON, *Respondent*, v. RICHARD
DUNCAN, *Appellant*.¹

HOMICIDE—INSTRUCTIONS—PREMEDITATED DESIGN. Upon defining murder in the first degree, it is proper to instruct that premeditated design is a mental operation of thinking upon an act before doing it or upon an inclination before carrying it out.

SAME. It is proper to instruct that malice aforethought or premeditated malice is the intention to unlawfully take life, meditated upon before the act, without any particular fixed time and that but a moment need be taken in the formation of the design.

SAME—PRESUMPTIONS AND BURDEN OF PROOF—DEGREES. Upon a prosecution for murder, it is proper to instruct that, if the killing is proved beyond a reasonable doubt, the presumption of law is that it is murder in the second degree, and the burden of proving justification is upon the defendant.

CRIMINAL LAW — APPEAL — REVIEW—INVITED ERROR—INSTRUCTION ON ALIBI. Accused in a prosecution for murder cannot complain of the giving of an instruction upon the subject of alibi, on the theory that alibi was not his defense, where he requested an instruction upon that subject and had introduced evidence to establish an alibi.

SAME—HARMLESS ERROR—INSTRUCTIONS GIVEN. Error cannot be predicated on the refusal to give a requested instruction that was fully covered in the general charge.

SAME—INSTRUCTIONS—CREDIBILITY OF WITNESSES—REQUESTS. In a prosecution for murder, it is proper to refuse to give precautionary instructions as to the credibility to be given evidence of declarations and statements alleged to have been made by the accused and testified to by witnesses, where other instructions were given to the effect that the jury was the sole judge of the credibility of the witnesses and should consider their conduct, the reasonableness of their story, etc., and where the statements of the accused referred to, although they showed his relations with deceased and motives of jealousy or revenge, were not strictly in the nature of confessions or admissions of the accused but rather in denial or avoidance thereof.

HOMICIDE—EVIDENCE—SUFFICIENCY. The killing being admitted and there being a presumption of murder in the second degree, a verdict of murder in the first degree, supported by circumstantial evidence, is not so unsupported as to require a new trial for want

¹Reported in 172 Pac. 915.

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of evidence, where there was no attempt by defendant to prove self-defense or other justification, or other elements reducing the offense to manslaughter or murder in the second degree.

CRIMINAL LAW—NEW TRIAL—TIME FOR APPLICATION—REOPENING JURISDICTION. Under the statute requiring an application for a new trial in a criminal case to be made before judgment (Rem. Code, § 2181), and within two days after verdict (Id., § 402), after a motion for a new trial made within two days after verdict has been overruled and judgment entered, the court has no jurisdiction to grant a motion to set aside the denial of the new trial and to re-submit the case; nor would the court have jurisdiction to do so after appeal from the judgment.

Appeal from a judgment of the superior court for Whatcom county, Hardin, J., entered April 24, 1917, upon a trial and conviction of murder. Affirmed.

Walter A. Martin, Walter B. Allen, and Bell & Hodge, for appellant.

W. P. Brown and Loomis Baldrey, for respondent.

HOLCOMB, J.—The verdict of the jury, convicting appellant of the crime of murder in the first degree, was returned and filed on April 3, 1917. A motion for a new trial upon the statutory grounds in the language of the statute was served and filed April 4, 1917. The motion was argued in the court below and by it denied on April 24, 1917, and on the same date, the judgment and sentence of the court on the verdict was filed and entered. On April 25, 1917, appellant served and filed his notice of appeal to this court, and no bond being required in a criminal case, the notice of appeal constituted his appeal to this court. Thereafter, on May 9, 1917, appellant served and filed a motion to set aside the order of April 24, 1917, denying his motion for new trial, and at the same time moved for an extension and enlargement of the time for submission of a motion for a new trial and reargument thereof and supported the same by affidavits, which motion was, on May 14, 1917,

upon notice, brought on for hearing in the court below and, after argument, was denied by the court upon the ground that it had lost jurisdiction of the matter under the statute by reason of the appellant having appealed to the supreme court.

Appellant first complains of the giving of an instruction by the court, quoted in part as follows:

“Premeditated design is a mental operation of thinking upon an act before doing it or upon an inclination before carrying it out.”

This instruction was given in one stating all the elements and legal terms defining murder in the first degree. Almost the exact language of this instruction was approved in *State v. Straub*, 16 Wash. 111, 47 Pac. 227. The same definition of premeditation or premeditated design is given in 31 Cyc. 1162.

Complaint is also made of instruction No. 11 given by the court as follows:

“You are further instructed that malice aforethought or malice with premeditation, or premeditated malice, which is another way of putting it, in a case of this kind is where the intention to unlawfully take life is deliberately formed in the mind, and that determination meditated upon before the fatal shot is fired. There need be no fixed or definite length of time between the formation of the intention to kill and the killing, but there must be actual time for meditation between the formation of the intention to kill and the homicide. It is sufficient if the act of killing be preceded by a concurrence of will, deliberation and premeditation on the part of the slayer, though but a moment be taken in the formation of the design to kill and in the deliberation upon and meditation of such design before carrying it into effect.”

It is contended that this instruction is identical with one disapproved by this court in *State v. Rutten*, 13 Wash. 203, 43 Pac. 30, and similarly in *State v.*

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Moody, 18 Wash. 165, 51 Pac. 356. The contention is that the instruction did away with the idea of deliberation. The instruction in this case is very similar to the one approved in *State v. Straub*, *supra*, distinguishing the instruction in that case and the one in the *Rutten* case; and the language in the instruction here:

“It is sufficient if the act of killing be preceded by a concurrence of will, deliberation and premeditation on the part of the slayer though but a moment be taken in the formation of the design to kill and in the deliberation upon and meditation of such design before carrying it into effect,”

met with the approval of the court in the *Straub* case, *supra*. It was not erroneous.

The next complaint is that the court instructed the jury:

“You are further instructed that, if the killing of one human being by another is proven beyond a reasonable doubt, the presumption of law is that it is murder in the second degree. . . . If the defendant seeks to justify the acts in such case the burden is upon the defendant so to do.”

That such instruction states the law as declared in this state is settled by the following cases: *State v. Payne*, 10 Wash. 545, 39 Pac. 157; *State v. Clark*, 58 Wash. 128, 107 Pac. 1047; *State v. Drummond*, 70 Wash. 260, 126 Pac. 541; *State v. Hawkins*, 89 Wash. 449, 154 Pac. 827.

The next complaint is of an instruction given by the court which appellant says told the jury that the defense of appellant was an alibi, and further, in discussing the evidence of an alibi, says that the evidence of an alibi should account for the defendant during the whole period in which the jury should find that the offense charged was committed. It is asserted that the instruction was prejudicial to the appellant because the defense was not necessarily an alibi as a matter of fact,

but that the defense was simply one of not guilty. The instruction was that *one* of the defenses interposed by the appellant was an alibi; then defining an alibi in accordance with approved declarations of this court and stating how an alibi was to be proven by the accused, not by evidence beyond a reasonable doubt or even by a preponderance of the evidence, but if the evidence upon the proposition raised a reasonable doubt in the minds of the jury as to whether the accused was at another place than that at which the crime was committed at the time of its commission, if committed, it would be sufficient. Appellant is not in a position to complain of the giving of the instruction upon the subject of alibi, because appellant himself submitted an instruction upon that same subject and introduced evidence in his own behalf attempting to establish an alibi. The instruction given was more complete and accurate than the one requested by appellant and he is not prejudiced thereby.

Appellant requested the court to give seventeen instructions, and argues that two of the requested instructions should have been given and that the court erred in not giving them. One of these, the sixth, was a request upon circumstantial evidence. The court gave a very elaborate and accurate instruction upon the subject of circumstantial evidence, its weight and value in criminal cases, which has been approved in 2 Blashfield's Instructions to Juries, §§ 2414, 2454. The instruction was, in fact, more instructive to the jury than that offered by appellant.

The next assertion is that requested instruction No. 8 should have been given, as follows:

“A part of the evidence of the state consists of certain declarations or statements alleged to have been made by the defendant and testified to by witnesses in this case; the court instructs you that the law is that

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such evidence should be received with great caution as the liability to mistake on the part of the witnesses may occur in the repetition of language, the understanding of what was said, or the speaker may not have conveyed fully to the witness the idea intended by the language used, therefore, for such reasons such testimony is to be received by you with great caution and weighed with great care."

No authorities are cited to sustain the propriety of the foregoing instruction. The court did, by other instructions, instruct generally upon the question of the credibility of witnesses, the manner of judging testimony, and the duty to harmonize same, and without singling out any class of witnesses or line of testimony, and instructed the jury upon that question in a manner generally approved.

The jury were instructed that they were the sole and exclusive judges of the credibility of the witnesses who testified; that they should take into consideration the interest of the witnesses who testified in the result of the case, if any such interest was proven, their conduct and demeanor while testifying, their apparent fairness or bias, if any such appeared, their opportunity for seeing or knowing the things about which they testified, the reasonableness or unreasonableness of the story told by them, and all the evidence and facts and circumstances proven in the case and tending to corroborate or contradict such witnesses, if any such appear; that they were not bound to believe anything to be a fact because a witness had stated it to be so, if they believed from all the evidence that such witness was mistaken or knowingly testified falsely. The latter part of the instruction given, in a general way and without particularizing any testimony or calling attention to any particular witnesses, covered the ground requested by appellant.

If the requested instruction was intended to apply to the class of evidence known as confessions, made by the accused, there was nothing in the evidence in the case that the alleged statements by appellant were made under inducement or fear in any way, and the above instruction does not cover that subject.

Furthermore, the instruction requested referred to declarations or statements made by the defendant and testified to by witnesses. The instruction stated the law with reference to admissions. Admissions are distinguishable from confessions. Admissions are concessions or voluntary acknowledgments made by a party of the existence or truth of certain facts. Bouvier's Law Dictionary. Recognition as fact or truth, acknowledgment, concession; also the expression in which such assent is conveyed. Anderson's Law Dictionary. An admission is a statement, oral or written, suggesting any inference as to any fact in issue relative, or deemed to be relative, to any such fact, Stephens, Digest of Evidence (4th ed.), § 39.

The evidence of witnesses as to statements of appellant consisted of detailed accounts of the whereabouts of appellant on the day in question, his acts, an account of a quarrel with the deceased, her whereabouts on that day, and facts from which the jury could, with other circumstances shown by evidence as to the manner of the killing of the deceased, infer a motive on the part of the appellant to kill the deceased, viz., jealousy and revenge. However, there was nothing in the way of direct admissions on the part of appellant in the statements testified to of any connection on his part with the crime itself, but they were rather in the nature of denials and avoidance of admissions of any connection with the crime. The statements did, however, as said, show his relations with the woman and, circumstantially, a motive for the crime. These were to be

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derived from the facts as stated by him as to his relations with the woman, together with the manner and circumstances of the killing as shown. But, strictly speaking, they were not to be considered as admissions. The instruction requested the law to be given as if the statements shown were admissions or declarations. As to them, it is true, the law is that the weight to be given to evidence of admissions may depend upon various matters affecting its accuracy; as, for example, the liability to mistake what has been said, resulting either from the frailty of human memory, the natural inability to detail what has been said by another precisely as it was said, and the liability to purposely color or mistake what was said. Consequently it is stated to be the rule that evidence of admissions, particularly mere verbal admissions, should be received with caution. But it is equally well settled that admissions deliberately made and clearly proved are very strong and satisfactory evidence as against the party making them. The weight to be given to admissions is to be determined by the jury under proper instructions by the court. 1 Ency. Evidence, 610, 611, 612. It is also said to be a general rule that it is not unfair to take a man at his word (*Robinson v. Stuart*, 68 Me. 61), and that admissions may be the best or the weakest kind of evidence. *Parker v. McNeill*, 12 Smed. & M. (Miss.) 355. From the nature of the testimony referred to, the instruction requested was not appropriate and it was not error to refuse it.

The next ground of error is the denial of the motion for a new trial. This is based largely upon the giving of the instruction heretofore discussed, to the effect that, if the killing of one human being by another is proven beyond a reasonable doubt, the presumption of law is that it is murder in the second degree, and if the defendant seeks to justify the acts in such a case,

the burden is upon him so to do; and further, upon the alleged insufficiency of the evidence to justify a finding by the jury that the appellant was guilty of homicide. The evidence was largely circumstantial and the record is very voluminous, but, in our opinion, there was ample evidentiary support for the verdict of the jury. There being no attempt on the part of the appellant by evidence to justify the killing, or to show the elements constituting manslaughter or murder in the second degree only, or self-defense or anything of that kind which would reduce the offense from murder in the first degree or justify the killing, the verdict was proper.

There is nothing to support the contention of appellant that "if the evidence points to Duncan as the guilty party, equally as strong is it that, if he killed her, it was the result of a sudden and unexpected quarrel, done in the heat of passion and under extreme provocation. She was the aggressor."

The last error claimed is that the court erred in denying the motion to set aside the order denying the new trial and to resubmit the same. Section 2181, Rem. Code, provides that an application for a new trial in a criminal case must be made before judgment, providing the grounds therefor. Section 402, Rem. Code, provides that the party moving for a new trial must move therefor within two days after the verdict of the jury, or within such further time as the court within which the action is pending or the judgment thereof may allow. Appellant filed his motion within two days and had it disposed of, and the judgment had been entered when the motion to set aside the former order and resubmit the same was filed. The court had then lost jurisdiction of the matter, and it had further lost jurisdiction by reason of the fact that appellant had served and filed his notice of appeal to this court. The court below had no jurisdiction to pass upon the motion to

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resubmit the motion for a new trial, and the case was then appealed to this court. The matters in support of that motion are, therefore, not properly in the record nor before us and cannot now be considered. *State v. Scott*, ante p. 199, 172 Pac. 234; *White v. Sanders*, 99 Wash. 172, 168 Pac. 1140. The last cited case being a civil case, appeal was not perfected until a bond had been filed. This case being a criminal case and no bond being required, appeal is complete upon giving the notice of appeal.

There being no errors found in the record, and which we can consider, justifying a reversal, the judgment is affirmed.

ELLIS, C. J., MOUNT, and FULLERTON, JJ., concur.

[No. 14439. Department Two. April 27, 1918.]

MARY N. HATCH, *Appellant*, v. HOVER-SCHIFFNER
COMPANY *et al.*, *Respondents*.¹

APPEAL—RECORD—EXCEPTIONS—STATEMENT OF FACTS. In the absence of exceptions to the findings of fact, or any statement of facts, an appeal in which there is no question raised which is determinable apart from the facts will be dismissed and the judgment will be affirmed.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered December 18, 1916, upon findings in favor of the defendants, in an action for damages, tried to the court. Affirmed.

Robertson & Miller and C. H. White, for appellant.

A. E. Gallagher, for respondents.

PER CURIAM.—In this case no exceptions were taken to any of the findings of fact and conclusions of law as

¹Reported in 172 Pac. 817.

made by the court, and no statement of facts or bill of exceptions is in the record, nor has any been settled or allowed by the trial court. No question is raised which is determinable apart from facts to be shown by a statement of facts. It has been repeatedly held by this court that, where no exceptions have been taken to the findings and where there is no statement of facts, there is nothing before this court to review and we must dismiss the appeal and affirm the judgment. *Beeler v. Barr*, 90 Wash. 258, 155 Pac. 1040, and cases there cited. Judgment affirmed.

[No. 14491. Department One. April 27, 1918.]

H. H. RUST, *Respondent*, v. WASHINGTON TOOL &
HARDWARE COMPANY, *Appellant*.¹

EVIDENCE—OPINION EVIDENCE—NONEXPERTS. Upon an issue as to the mental condition of plaintiff, shortly after he was injured, non-expert witnesses who saw him trembling and incoherent and unable to walk, may testify that he was not in possession of his mental faculties, where they were testifying to facts and their opinions drawn from facts within their observations.

WITNESSES—IMPEACHMENT—INTEREST—AGENT OF INDEMNITY COMPANY. Upon an issue as to plaintiff's mental condition when he signed a release of damages and an affidavit of exoneration, evidence is admissible, as affecting his credibility, that the witness who procured the release and affidavit was agent of the insurance company writing the liability policy.

TRIAL—INSTRUCTIONS—REPETITION. Unnecessary repetition in instructions will not work a reversal, where they merely stated the law properly under varying conditions of evidence, and the repetition was not unwarranted.

APPEAL—REVIEW—INVITED ERROR. Improper argument to the jury respecting a compromise or settlement is not ground for a reversal, where the same was offered in answer to an equally improper utterance of opposing counsel on the subject of compromising the claim.

¹Reported in 172 Pac. 846.

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Opinion Per FULLERTON, J.

DAMAGES — EXCESSIVE VERDICT — PERSONAL INJURIES. A verdict for \$2,500 for injuries sustained by a physician 78 years of age, will not be held excessive, where it appears that he suffered a dislocation of the knee cap, cuts and bruises about the head and body, and a permanent injury to the ankle and bones of the foot, causing inconvenience, constant care, and pain.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered May 26, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained through a fall down an elevator shaft. Affirmed.

Bates & Peterson, for appellant.

Guy E. Kelly and *Thomas MacMahon*, for respondent.

FULLERTON, J.—The respondent, while a customer in the store of appellant engaged in making purchases, fell into an open elevator shaft and injured his foot. He brought this action for damages, and recovered a judgment for \$2,500. An appeal is prosecuted in which errors are assigned upon the insufficiency of the evidence, the improper admission of evidence, and the denial of a new trial, based on improper instructions, misconduct of counsel, and excessiveness of the verdict.

The evidence shows that respondent, a man 78 years of age, residing in Gig Harbor, Washington, was in appellant's storeroom in the city of Tacoma purchasing various articles of hardware. Certain articles desired by him were located on the second floor of the building, and the clerk suggested that, in going to the place, they take the elevator. The clerk opened the door to the elevator and reached in to pull a rope to bring the car down from the floor above. The respondent, assuming that the car was in place, stepped into the shaft and fell some three feet to the bottom of the pit.

The clerk, while endeavoring to extricate him, was himself struck by the descending car and severely injured. The respondent was considerably bruised and shaken by his fall, but advised that first aid be given to the clerk, who was apparently the more severely injured. The appellant carried a liability policy of insurance on its elevator in the Fidelity & Deposit Company of Maryland, and at once summoned the local agent of the company. The appellant, through the agent, offered to pay the respondent for whatever damages he had suffered, and the latter, not realizing how seriously he was injured, fixed his damages at twenty dollars and executed a release of all claims in consideration of that sum, and at the same time made an affidavit that his injuries were due to his own fault and that the appellant was in nowise to blame. The respondent was assisted to the steamer plying between Tacoma and his home, and those assisting him testified he was "trembling" and "kind of scared like." Passengers on the boat and others who were acquainted with him testified that he was incoherent in speech, his face pale and drawn, his body trembling; that he toppled over when he tried to walk across the cabin; that he attempted to get off the boat at a wrong wharf; that he had to be carried off the boat and home on the back of a neighbor; that he was dazed and not in possession of his mental faculties; that he continuously uttered "Don't tell mother," and that subsequently he could get about only by the use of two crutches. On the trial, the respondent testified he did not know what he was doing when he signed the release and the affidavit exonerating the appellant, and in this he is corroborated by a doctor called in to attend the injured clerk, who, after removing the clerk to his home, returned to the store and found the respondent, about an hour after the accident, sitting there in a dazed condition. While there is some

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Opinion Per FULLERTON, J.

contradiction on minor details of the testimony, the substance of the evidence is as outlined.

The appellant contends that there was error in permitting the nonexpert witnesses, who were fellow passengers on the boat with the respondent, to state their opinions as to the latter's mental condition. These witnesses testified that, at that time, the respondent was not in possession of his mental faculties. But this testimony was based on their observations of his physical condition, his evident suffering, and his incoherent speech, in the light of their acquaintance with his previous condition. They were testifying to facts, and their opinions drawn from facts within their observation, not giving an opinion upon a hypothetical question. Such evidence is admissible. *State v. Brooks*, 4 Wash. 328, 30 Pac. 147; *In re Gorkow's Estate*, 20 Wash. 563, 56 Pac. 385; *Higgins v. Nethery*, 30 Wash. 239, 70 Pac. 489; *State v. George*, 58 Wash. 681, 109 Pac. 114; *State v. Craig*, 52 Wash. 66, 100 Pac. 167; Jones, Evidence (2d ed.), § 364.

It is also contended that there was error in allowing the introduction of evidence showing that the witness Hansen, who procured the release and the affidavit of exoneration from the respondent, was the agent of an insurance company which carried a liability policy on the appellant's elevator. This testimony was properly elicited for the purpose of showing Hansen's interest in the case with a view to affecting his credibility. *Moy Quon v. Furuya Co.*, 81 Wash. 526, 143 Pac. 99.

Error is assigned upon the court's charge to the jury upon the matter of the release executed by the respondent. The court gave an instruction requested by the appellant which fully covered the matter from the standpoint of the appellant, and then went further and covered varying features of the same question in half a dozen paragraphs outlining the law as applied to the

inferences the jury might draw from the facts in favor of the one or the other of the litigants. We gather from the brief that no objection is raised to the law as stated, but that the complaint is that the court, by unnecessary repetition, gave undue prominence to one feature of the case, thereby tending to create an impression on the jury as to the court's opinion with regard to the facts. It is further suggested that these numerous paragraphs necessarily destroy the effect of the requested instruction given at the behest of the appellant. An examination of each portion of the charge shows that it is a proper statement of the law as applied to varying conditions of the evidence. While the charge was capable to some extent of condensation, we do not find that there was any unwarranted repetition.

Misconduct of counsel for respondent in the closing argument is predicated upon the following remarks to the jury which, over the objection of the appellant, were allowed to stand:

"It was not competent evidence to show efforts looking towards a compromise or settlement of this action between the plaintiff and the defendant. You do not know what had taken place between these parties since the accident, and if you did know it might put a different aspect upon the case."

This remark, standing alone, would in all probability be inexcusable, but it was offered in answer to an equally improper utterance of opposing counsel, who had stated that a failure to prove efforts to compromise showed that plaintiff had been satisfied with the settlement. The error complained of by appellant was one invited by himself, and he cannot be heard now to urge it as prejudicial. *Donaldson v. Great Northern R. Co.*, 89 Wash. 161, 154 Pac. 133.

The final contention of appellant is that the award of \$2,500 for the injury sustained was excessive. The

evidence shows that the respondent, although at the advanced age of 78 years and with but a short expectancy of life, is still practicing his profession as a physician, and is incommoded therein by the condition of his foot, which still causes him pain in its use. At the time of the accident, the respondent suffered a dislocation of the knee cap, cuts and bruises about the head and body, and a dislocation of the bones of his foot. He was confined to his bed several weeks, and compelled for seven or eight months to use crutches. The ankle is stiffened, the bones of the foot have fallen down, there is no arch, and the heel bone is left unaided to sustain his weight. The bones are in such a condition that they must be kept in place by tight bandages of adhesive tape, and a heavy iron form must be used in the shoe so as to create an artificial arch, and a cane is necessary to assist in walking. If the respondent steps on a pebble he either falls or the rolling of the foot causes great pain. The injury is permanent and one that cannot be remedied by an operation. The respondent still suffers pain in the use of the foot and whenever the bandages are adjusted. While the award to this court appears large in view of the advanced age of the respondent, the trial court, in the exercise of its discretion, refused to make a reduction. We feel that we would not be warranted, under the circumstances and showing made, in interfering with the award returned by the triers of the fact.

The judgment is affirmed.

ELLIS, C. J., PARKER, MAIN, and WEBSTER, JJ., concur.

[No. 14512. Department Two. April 27, 1918.]

JOHN EMBAGI, *Appellant*, v. NORTHWESTERN
IMPROVEMENT COMPANY, *Respondent*,
A. W. HENDRICKS, *Defendant*.¹

CHattel MORTGAGES—ACKNOWLEDGMENT AND RECORDING—"CREDITORS" AND "INCUMBRANCERS"—STATUTES—CONSTRUCTION. A preferred creditor who takes a quitclaim deed in payment of its antecedent debt, with actual notice of a prior unacknowledged and unrecorded chattel mortgage unaccompanied by an affidavit of good faith, is both a creditor and incumbrancer for value and in good faith, within Rem. Code, § 3660, providing that such a chattel mortgage is void as to creditors, subsequent purchasers and incumbrancers for value and in good faith; and its title by the quitclaim is superior to the mortgage.

Appeal from a judgment of the superior court for Kittitas county, Holden, J., entered May 7, 1917, in favor of the defendant grantee, in an action to foreclose a chattel mortgage, tried to the court. Affirmed.

Pruyn & Hoeffler, for appellant.

Geo. T. Reid, J. W. Quick, and L. B. da Ponte, for respondent.

MOUNT, J.—The appellant brought this action to foreclose an alleged chattel mortgage which was in the form of a bill of sale, without the affidavit of good faith required by Rem. Code, § 3660, and which was not recorded. The Northwestern Improvement Company was joined as a party because it claimed ownership of the property sought to be foreclosed against. Upon issues joined, the case was tried, and the court concluded that the property in question was the property of the Northwestern Improvement Company and entered a judgment to that effect. The plaintiff has appealed.

The facts are not disputed. They are substantially

¹Reported in 172 Pac. 834.

as follows: In the year 1914, the Northwestern Improvement Company was the owner of a certain tract of land in the vicinity of Cle Elum, in this state. In March, 1914, A. W. Hendricks entered into negotiations with that company to lease a portion of this tract of land. He was advised that the tract was already under lease which would not expire until the fall of 1914, but that, after the expiration of that lease, he could have a lease upon the land. Thereupon Hendricks entered into possession of a part of the land and commenced the construction of a dwelling-house and outbuildings. He purchased the material for the construction of these buildings from the respondent, beginning on the 7th of April, 1914, and ending on the 14th of October of that year. On May 11, 1914, while the buildings were in course of construction, Hendricks borrowed from the appellant \$400, and gave the appellant a conditional bill of sale covering the buildings. This bill of sale was neither acknowledged nor accompanied by an affidavit of good faith nor recorded. Hendricks did not pay for the materials that were purchased from the Northwestern Improvement Company, and on November 4, 1914, the improvement company, filed a claim of lien against the buildings for materials used therein amounting to \$981.60. On the 13th of March, 1915, Hendricks gave to respondent a quitclaim deed to the buildings in consideration of \$1,098.35, being the amount then owing by Mr. Hendricks to the improvement company. That company took immediate possession of the buildings, which were worth not to exceed \$1,000 at that time. At the time this deed was given, Mr. Hendricks informed the company that he had given a bill of sale of the buildings to the appellant. Thereafter, in August, 1915, the appellant brought this action to foreclose the bill of sale, which was alleged to be a chattel mortgage.

It is argued by the appellant that, because the respondent, Northwestern Improvement Company, had notice of the bill of sale given to the appellant at the time Hendricks executed the quitclaim deed and delivered possession of the property, the respondent is not a purchaser in good faith. In the case of *Smith v. Allen*, 78 Wash. 135, 138 Pac. 683, Ann. Cas. 1915D 300, we had occasion to review the cases from this court relied upon by the appellant, and a number of other cases, and we there held, as stated in the syllabus, that a creditor who takes a valid chattel mortgage to secure his antecedent debt, with notice of a prior unacknowledged chattel mortgage given to secure another creditor, is both a creditor and an incumbrancer for value and in good faith within Rem. Code, § 3660, providing that a chattel mortgage without acknowledgment is void as to creditors, subsequent purchasers and incumbrancers for value and in good faith; and his mortgage is therefore superior to the prior unacknowledged mortgage. That rule is conclusive of the question presented in this case. In that case we were considering a chattel mortgage which was taken with notice of a prior unacknowledged chattel mortgage, one which did not contain the affidavit of good faith and one which was not recorded. There is no difference in principle in the two cases. The same rule was followed in *Kato v. Union Oil Co.*, 92 Wash. 473, 159 Pac. 692, and in *Belcher v. Young*, 90 Wash. 303, 155 Pac. 1060. The trial court was, therefore, right in concluding that the appellant's bill of sale or chattel mortgage was of no effect against a quitclaim deed and possession held by the respondent, Northwestern Improvement Company.

The judgment is therefore affirmed.

ELLIS, C. J., FULLERTON, CHADWICK, and HOLCOMB, JJ., concur.

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[No. 14514. Department Two. April 27, 1918.]

THE STATE OF WASHINGTON, *on the Relation of Edward Taro, Respondent*, v. THE CITY OF EVERETT *et al.*,
*Appellants.*¹

MANDAMUS—PARTIES—RIGHT TO REMEDY—CITY EMPLOYEES. A member of the fire department indirectly affected, though not a citizen or taxpayer of the city, has capacity to institute mandamus proceedings to compel the city council to put into effect an ordinance increasing the force in the fire department; inasmuch as the statutory writ of mandamus is not a prerogative writ but a civil procedure available to any person having the right, the same as the right to commence a civil action.

MUNICIPAL CORPORATIONS—INDEBTEDNESS—LIMITATIONS—FIRE DEPARTMENT—EXPENSES. The maintenance of an efficient force in the fire department of a city of the first class is a governmental function, to which the constitutional limitation upon municipal indebtedness has no application, which accordingly is no defense to mandamus proceedings compelling enforcement of an ordinance providing for the same.

MANDAMUS—TO CITY COUNCIL—DISCRETION—EFFICIENT FIRE DEPARTMENT. The courts will not interfere with the discretion of the city authorities in determining the necessity of increasing the fire department, except for abuse of discretion or when the abuse is so gross that reasonable minds cannot differ thereon; and the decision of the electors of a city of the first class that a double platoon system is necessary for adequate fire protection is not unreasonable on its face.

Appeal from an order of the superior court for Snohomish county, Bell, J., entered July 6, 1917, granting a writ of mandamus to compel a city council to enforce an ordinance, upon sustaining a demurrer to the answer. Affirmed.

Wm. A. Johnson, for appellants.

Sherwood & Mansfield, for respondent.

FULLERTON, J.—This is an appeal from an order of the superior court of Snohomish county, granting a

¹Reported in 172 Pac. 752.

peremptory writ of mandamus against the city council of the city Everett compelling that body to put in force an ordinance of the city. The cause was before the trial court, and is before us, upon the allegations of the petition for the writ and the allegations of the answer thereto, the trial court having sustained a general demurrer to the answer and the answering defendants having elected to stand thereon.

The record discloses that the city of Everett is a city of the first class, operating under a freeholders' charter duly adopted by its electors. The charter creates a commission form of government. Three commissioners are provided for—a commissioner of public works, a commissioner of safety, and a commissioner of finance—who together comprise the city council and who, in addition to having legislative functions, are charged with the executive administration of the city's affairs. The charter also provides for the method of legislation known as the initiative. This method, in so far as it is material here to inquire, authorizes the submission to the city council of proposed legislation in the form of ordinances, by a definite number of the qualified electors of the city, which the council may either pass without alteration under its legislative powers or submit to the electors of the city at a general or special election, when, if an affirmative vote is in its favor, it thereby becomes a part of the city's laws (Charter, art. 4, §§ 22, 23; art. 11, §§ 87, 88, 93).

Pursuant to the foregoing provisions of the city charter, a proposed ordinance was duly submitted to the council relating to the city's fire department. The department then consisted of one chief, one assistant chief, four captains, four lieutenants, one engineer, one assistant engineer, six auto drivers, seven pipemen, and one master mechanic, organized as a single platoon, the members remaining constantly on duty save

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for stated limited intervals. The proposed ordinance increased the number of pipemen from seven to sixteen and divided the department into two platoons, one for day and one for night service, thus reducing the number of hours of continuous service required of the individual employees. The ordinance was later submitted to the electors for adoption, and was by them adopted by the required majority on November 7, 1916, going into effect on January 1, 1917 (Ordinance No. 1,758).

It further appears that the city council and the members thereof, having the duty so to do, refused to increase the number of the members of the department as required by the ordinance, and refused otherwise to carry out its provisions. As a reason for so refusing they set up in substance that, before the adoption of the ordinance, the city council had made its estimates and its tax levy to meet the expenses of the city government for the year 1917; that, in this estimate and levy, it had provided for the fire department the sum of \$36,147, and for a contingent fund the sum of \$1,000, all of which was not more than sufficient to maintain the department as it then existed; that to increase the department as required by the ordinance would cost approximately \$10,000, and that they had no means of providing for this additional expense; that the city was then indebted in a sum exceeding its constitutional limitation, and could not legally incur a further indebtedness; and that, for these reasons, the obligation necessary to be incurred to carry out the provisions of the ordinance would, in their judgment, be illegal.

Certain preliminary objections were made to the proceedings prior to answering by the appellants, all of which were waived in this court, save the objection to the relator's capacity to maintain the proceeding. In his petition the relator averred that he was a mem-

ber and employee of the fire department of the city of Everett and brought the proceeding on behalf of himself and on behalf of the other members and employees of such department. The truth of the allegation is not disputed, but attention is called to the fact that the relator does not allege that he is a citizen and taxpayer of the city of Everett, and it is argued that a mere employee of the city has no capacity as such to invoke the remedy of mandamus against the officers of the city to enforce a public duty, however much he may be benefited individually thereby; that his remedy, if any he has, for the wrongs suffered by him individually is a private action, not the extraordinary remedy of mandamus. But however forceful this objection might be as applied to proceedings under the writ as anciently administered, this court has held that it is without application to the statutory writ of mandamus; that the writ of mandamus under the code is not a prerogative writ issuable at the pleasure of the state in aid of a private individual, but a civil procedure under the code, and that any person who has a cause for its invocation has the same right to sue out the writ as he has to commence a civil action to redress a private wrong. *State ex rel. Race v. Cranney*, 30 Wash. 594, 71 Pac. 50; *State ex rel. Brown v. McQuade*, 36 Wash. 579, 79 Pac. 207; *State ex rel. Spokane Terminal Co. v. Superior Court*, 40 Wash. 453, 82 Pac. 878; *State ex rel. Gillette v. Clausen*, 44 Wash. 437, 87 Pac. 498; *State ex rel. Washington Paving Co. v. Clausen*, 90 Wash. 450, 156 Pac. 554; *State ex rel. Beach v. Olsen*, 91 Wash. 56, 157 Pac. 34.

The benefit to accrue to the relator by putting in force the provisions of the ordinance are indirect, it is true. But it is a substantial benefit nevertheless. It will lessen his hours of labor, the number of hours he is required to remain continuously on duty without

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intermission. Nor does he hold his position at the whim or caprice of the appointing power and thus subject against his will to be deprived of the benefits of the ordinance. It appears in the record, although not directly in this connection, that he holds under civil service rules and is thus liable to discharge only for cause alleged and proven against him.

On the merits of the controversy, the principal contention for reversal is that the writ compels the doing of an unlawful act. It is not asserted, of course, that the duty to enforce the provisions of an ordinance duly and legally enacted is discretionary with the city officers. On the contrary, it is conceded that it is their imperative duty so to do if the means lie within their power. The obligation is denied in this instance because beyond the officers' powers. The reason is founded on the allegations of the answer, to the effect that the ordinance could not be enforced for the year 1917 without the expenditure of approximately \$10,000; that the city had made its appropriations and tax levies for that year without taking into account this expense, and is therefore without authority to provide for it by additional levies; that the city had reached the debt limit permitted by the constitution and statutes and could not legally incur an additional indebtedness; and that, for want of means, or power to procure means, the enforcement of the ordinance is an impossibility.

But however sound this reasoning might be when applied to a proper state of facts, we think it unsound in the particular instance because unfounded in its principal assumption. This court early laid down, and has since consistently adhered to, the rule that the limitation on indebtedness of municipalities imposed by the constitution was inapplicable to such obligations as were made mandatory by that instrument or were

necessary to maintain the existence of the corporation. It was recognized that the maintenance of city governments was essential to the health, safety, and general welfare of the people of the city, and consequently the limitation of indebtedness imposed could not have been intended to be so far exclusive as to necessitate the suspension of government. *Rauch v. Chapman*, 16 Wash. 568, 48 Pac. 253, 58 Am. St. 52, 36 L. R. A. 407; *Duryee v. Friars*, 18 Wash. 55, 50 Pac. 583; *Gladwin v. Ames*, 30 Wash. 608, 71 Pac. 189; *Pilling v. Everett*, 67 Wash. 109, 120 Pac. 873; *Patterson v. Edmonds*, 72 Wash. 88, 129 Pac. 895.

That an efficient fire department is an essential for the protection, and therefore for the existence, of a municipality of the first class does not need argument to demonstrate. Indeed, in *Gladwin v. Ames*, *supra*, we held that fire insurance on city buildings was such a well recognized method of protection that warrants issued to cover the cost of such insurance, although in excess of the city's legal debt limit, were valid. For a much stronger reason are warrants valid issued under like circumstances to maintain a department for the extinguishment of fires. In *Lynch v. North Yakima*, 37 Wash. 657, 80 Pac. 79, 12 L. R. A. (N. S.) 261, and in *Cunningham v. Seattle*, 40 Wash. 59, 82 Pac. 143, 4 L. R. A. (N. S.) 629, we held the fire departments of municipalities to be governmental agencies for the negligent conduct of which by the employees in charge a municipality was not liable in damages; a holding in principle that they were necessary governmental functions. Without pursuing the inquiry further, therefore, we conclude that the maintenance of a fire department in the city of Everett is a necessary governmental function for which the city authorities may incur an indebtedness without violating the prohibition of the constitution limiting the indebtedness of munic-

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ipalities to a certain percentage of the value of their taxable property. It follows that the city authorities could support the department by creating an indebtedness, and it was error on their part to conclude that they were without power.

It is contended further, however, that, while a fire department may be a necessity, a double platoon system in such a department may not be a necessity, and whether it is so or not is within the province of the courts to inquire. But the rule is hardly as broad as the contention implies. While it is within the province of the court to inquire whether a fire department is such a necessity as to authorize the incurrence of an indebtedness for its maintenance beyond the legal limit, it will not ordinarily inquire into the character of the department the city maintains. This is a question within the discretion of the city authorities, whose decision will be disturbed only where there is a manifest abuse of discretion, an abuse so gross that it cannot be said that reasonable minds might reasonably differ thereon. The fact that the electors of the city here in question have concluded that a fire department with a double platoon system is a necessity for adequate fire protection does not carry on its face any presumption of unreasonableness, and nothing is alleged or shown that would indicate that it is unreasonable.

Other questions are touched upon in the arguments, but the conclusion reached on the questions discussed is conclusive of the objections urged and further consideration is unnecessary.

The judgment is affirmed.

ELLIS, C. J., CHADWICK, MOUNT, and HOLCOMB, JJ.,
concur.

[No. 14522. Department One. April 27, 1918.]

MOSES SMELTZER *et al.*, Respondents, v. JAMES B. WEBB
et al., Appellants.¹

LANDLORD AND TENANT—UNLAWFUL DETAINER—NOTICE TO QUIT—NECESSITY—TENANCY FROM YEAR TO YEAR—HOLDING OVER ON AGRICULTURAL LANDS. Under Rem. Code, § 813, authorizing an action of unlawful detainer in cases of tenancy upon agricultural lands where the tenant has held over for more than sixty days "without any demand or notice to quit by his landlord or successor in interest," any oral notice of termination of the lease and demand of possession at the expiration of the specified term, is sufficient to prevent the tenant from acquiring rights by holding over, and to authorize an action of unlawful detainer.

Appeal from a judgment of the superior court for Grant county, Hill, J., entered June 14, 1917, upon the verdict of a jury rendered in favor of the plaintiffs, in an action of unlawful detainer. Affirmed.

W. E. Southard, for appellants.

S. H. Cutting, J. D. McCallum, and *N. W. Washington*, for respondents.

PARKER, J.—The plaintiff, Smeltzer and wife, commenced this action to recover from the defendants, Webb and wife, the possession of a farm in Grant county which the defendants theretofore held under a lease from the grantors of the plaintiffs. The action was commenced and prosecuted under our unlawful detainer statute. Trial in the superior court for Grant county sitting with a jury resulted in verdict and judgment in favor of the plaintiffs, from which the defendants have appealed.

The farm in question, consisting of some six hundred acres of land with a dwelling and other buildings thereon, was, on January 12, 1914, leased by the then

¹Reported in 172 Pac. 750.

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Opinion Per PARKER, J.

owners, D. L. Woods and wife, for a term which, by the express terms of the lease, expired November 1, 1915. Some two months prior to the date of the expiration of the specified term, Woods and wife sold and conveyed the farm to respondents, who thereupon, as claimed by them, demanded of appellants that they surrender possession of the farm at the expiration of the specified term. This was not a formal written notice to quit such as is required by statute to be served upon a tenant looking to the termination of a lease or tenancy, but, as claimed by respondents, was a sufficient demand and notice to prevent appellants acquiring the right to occupy the farm for another year under the terms of the lease should they remain upon the farm sixty days after the expiration of the term, under Rem. Code, § 813, which reads:

“In all cases of tenancy upon agricultural lands, where the tenant has held over and retained possession for more than sixty days after the expiration of his term, without any demand or notice to quit by his landlord or the successor in estate of his landlord, if any there shall be, he shall be deemed to be holding by permission of his landlord or the successor in estate of his landlord, if any there be, and shall be entitled to hold under the terms of the lease for another full year, and shall not be guilty of an unlawful detainer during said year, and such holding over for the period aforesaid shall be taken and construed as a consent on the part of a tenant to hold for another year.”

The only evidence of this demand and notice introduced upon the trial was oral testimony of conversation had between Smeltzer and Webb and of work done by Smeltzer and his three sons upon the farm which amounted to taking possession of a large part of the land in October and November, 1915, by consent of appellants, from which testimony the jury found in effect that the demand and notice was made and given

as claimed by respondents. Appellants, however, continued to occupy the dwelling and use a portion of the land for more than sixty days after the expiration of the specified term of the lease, and thereafter respondents commenced this action to recover possession of the whole of the premises.

The principal contention here made in appellants' behalf is that the trial court erred in admitting testimony of the making of the oral demand for possession of the farm shortly prior to the expiration of the specified term of the lease. The argument is, in substance, that an oral demand or notice in such cases does not satisfy the requirements of § 813 above quoted, but that such demand and notice must be in writing, attended by all the formalities as to contents and service as notices to quit looking to the termination of tenancies which may become forfeited or which do not have a specified fixed ending. It seems to us this contention is effectually answered by our decision in *Mounts v. Goranson*, 29 Wash. 261, 69 Pac. 740. In that case, it is true, the notice was in writing, but it was not pretended that it was such formal notice, either as to contents or service, as is required in other unlawful detainer cases. That action, like this, was commenced after the tenant had retained possession more than sixty days following the termination of the lease term, that is, more than sixty days following the termination of the term as it had been extended from year to year by consent, the final termination date being May 6, 1897. After quoting the section of our statute defining unlawful detainer and §§ 812, 813, Rem. Code, which sections were then §§ 5527 and 5528, Bal. Code, Judge Mount, speaking for the court, said:

“It is clear from the first section quoted that the defendants were unlawful detainers for the period of sixty days after May 6, 1897, and no notice or demand

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to quit was necessary. Under the next section quoted, when defendants held for more than sixty days without demand or notice to quit, they were then entitled to hold for another year. We are of the opinion that this same condition arose at the expiration of the next year. Defendants were again unlawful detainers for sixty days, and so for each year they were permitted to occupy the premises under the lease; and an oral or written demand for the premises within sixty days after the expiration of any year, or any notice prior to the end of the year that the lease would be terminated, was sufficient to authorize the bringing of the action. The notice required by the statute to be served, wherein the time and manner of service must be stated in the complaint, as was held by this court in *Lowman v. West*, 8 Wash. 355 (36 Pac. 258), is a notice which terminates the lease before the limitation of time on account of some condition broken; but such is not the case here."

This is not a case of giving a statutory notice to quit looking to the termination of a tenancy, but it is a case of preventing the commencement of a new tenancy, or rather of preventing the renewal by consent of a tenancy which, by express terms of the contract creating it, expired on a specified date. We conclude that the trial court did not err in admitting testimony of the making of the oral demand for possession by respondents. Some other contentions are made in appellants' behalf, but we think they are so clearly untenable as to not call for discussion here.

The judgment is affirmed.

ELLIS, C. J., FULLERTON, WEBSTER, and MAIN, JJ.,
concur.

[No. 14525. Department Two. April 27, 1918.]

In the Matter of the Estate of JOHN J. PETERS.
JOHN NUHSE et al., Appellants, v. ANNA PETERSON
*et al., Respondents.*¹

WILLS—CONSTRUCTION—LANDS INTENDED — SUPPLIED DESCRIPTION. Where a testator only owned the southwest quarter of a section and intended to devise all of it to different persons, but only properly described the southeast and the southwest quarters of the tract, a devise to John Nuhse of "40 acres lying between my northeast corner and the south line of John Nuhse property" (which was testator's north line) will be construed as referring to the "northeast corner" of the testator's home place, which was his southeast quarter, and as devising the northeast quarter of the southwest quarter of the section.

SAME. In such case, a further devise to the same devisee of "also all property I own on the east side of the N. W. $\frac{1}{4}$ of sec. 33," will be held to refer to all the property on the "east side" of a county road running diagonally through the northwest quarter of the southwest quarter of the section.

SAME. In such case, a further devise to another, to whom the adjoining southwest quarter of the southwest quarter had been devised of "also all left of the N. W. $\frac{1}{4}$ of the same section," will be held to devise all left of the northwest quarter of the southwest quarter of the section.

WILLS—CONSTRUCTION. The testator's intention must be gathered from the language of the will, construing all the provisions together, omitted words may be supplied, and the will liberally construed to effectuate the testator's intention and, when possible, to sustain the right to dispose of one's property by will.

ELLIS, C. J., dissents.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered July 9, 1917, upon findings in favor of the defendants, in an action to construe a will, tried to the court. Reversed.

G. W. Hinman, for appellants.

Peter Husby, for respondents.

¹Reported in 172 Pac. 870.

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Opinion Per HOLCOMB, J.

HOLCOMB, J.—This is a petition for the purpose of construing the clauses of a will. Part of paragraph 2 of the will is as follows:

“I hereby give and bequeath unto John Nuhse . . . also 40 acres lying between my northeast corner and the south line of John Nuhse property; also all property I own on the east side of the N. W. $\frac{1}{4}$ of sec. 33, T. 31, N. R. 6 E., W. M.”

Paragraph 3:

“I hereby give and bequeath unto Henry Hoffman the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of sec. 33, T. 31 N. Range 6 E., W. M., in Snohomish county, Washington.”

Paragraph 6:

“I hereby give, devise and bequeath unto Mrs. Anna Peterson, of Tacoma, Washington, and Mrs. Mark Bartlett, of Seattle, Washington, the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of sec. 33, T. 31, N. R. 6 E., W. M. Also all left of the N. W. $\frac{1}{4}$ of the same section, township and range.”

It is conceded that the decedent owned only the southwest quarter of section 33, T. 31, N. R. E., W. M., and that he properly devised the southeast quarter of the southwest quarter in paragraph 3 of his will, and the southwest quarter of the southwest quarter of the section, etc. It is claimed by petitioners, and the trial court found, that, for indefiniteness of description, testator's will was a nullity as to the north eighty acres owned by him. For the purpose of clarity a plat of the section is set forth as has been admitted by the trial court in the record, as follows:

Martin Peterson 39.46	Andrew Nord 40.50	20	20	Thomas 39.95
John H Nuhse 38.99		20	20	McCaffery 40
Estate 38.61	of 39.92			August
John J. Peters 40	38.30			Stehr.

It is evident from reading the will that the testator intended to devise all his estate in different portions to different persons, although he did not express himself as clearly as should have been done.

"The testator's intention must be gathered from the language of the will, construing all the provisions together." (Syllabus) *McCullough v. Lauman*, 38 Wash. 227, 80 Pac. 441.

Now let us return to the clause, "also 40 acres lying between my northeast corner and the south line of John Nuhse property." The home place of the testator was on the southeast quarter of the southwest quarter of the section. It seems plain that he intended to give the forty acres between the northeast corner of his home place and the forty acres south of the south line of John Nuhse, as John Nuhse's property was the entire northern boundary of the testator's property.

Omitted words will be supplied in a will where it is

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evident the testator has not expressed himself as he intended. *Butler v. Moore*, 94 Ind. 359; *Estate of Espitalier*, 6 Cal. Prob. Dec. 299 (Cal.).

A court is bound to give that construction to a will which will effectuate the intention of the testator, if such intention can be gathered from the terms of the will itself, and the intention is to be gathered from everything contained within the four corners of the instrument. *Yates v. Shern*, 84 Minn. 161, 86 N. W. 1004.

The other clauses read (to John Nuhse), "also all property I own on the east side of the N. W. $\frac{1}{4}$ of sec. 33 T. 31 N. R. 6 E., W. M.," (paragraph 2 of the will) and (to Mrs. Bartlett and Mrs. Peterson) "also all left of the N. W. $\frac{1}{4}$ of the same section, township and range," (paragraph 6 of will). A county road runs through the northwest quarter of the southwest quarter of testator's property in a northwesterly and southeasterly direction, as shown by the plat. The question is, did the testator intend the portion on the east side of the road of the northwest forty of his estate for Nuhse, or the east side of the northwest quarter of the section *which he did not own*; and further, did he intend to devise to Bartlett and Peterson all that was left of the northwest forty of his estate, or all that was left of the northwest quarter of the section, township and range, *which he did not own*? It seems plain that the testator did not express himself in apt words. Mistakes in writing descriptions are numerous; even the respondents, in their brief (on page 8), used the words "northeast quarter" three times when they intended the *southwest* quarter.

There was no residuary clause in the will, and the testator depended upon two attorneys to properly express his intentions to devise all his property. Should we hold that the contested clauses of the will are void,

we would, in effect, hold that the testator did not intend to devise the north eighty acres of his estate. This should not be done contrary to the plain intent of the testator when it can be gathered from the wording of the will and the location and ownership of the estate.

"Where, upon examination of a will, taken as a whole, the intention of the testator appears clear, but its plain and definite purposes are endangered by inapt or inaccurate modes of expression, the court may, and it is its duty to, subordinate the language to the intention; it may reject words and limitations, supply or transpose them to get at the correct meaning." *Phillips v. Davies*, 92 N. Y. 199.

See, also, *In re Miner's Will*, 146 N. Y. 121, 40 N. E. 788.

Alford v. Bennett, 279 Ill. 375, 117 N. E. 89, is a late case with similar misdescription in a will, and where the court construed the description in the will to be of the land that the deviser actually owned. The testator owned the northeast quarter of the northwest quarter of a section, but did not own any of the northeast quarter of the section. A devise to one daughter of the north 25 acres of the northeast quarter of the section, following a devise to another daughter of 15 acres "off the south side of the northeast quarter of the northwest quarter" of the section, was a devise of the north 25 acres of the northeast quarter of the northwest quarter, being remaining land in the estate undisposed of by the testator, and the will containing no residuary clause.

The trial judge in his memorandum decision says:

"(1) That clause which read as follows: 'Also forty acres lying between my northeast corner and the south line of John Nuhse's property; also all property I own on the east side of the northwest quarter of section thirty-three, township thirty-one north, range six E. W. M.' is extremely hard for me to construe.

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“(2) I recognize the rule of law to be that the court should give effect to the intention of the testator if that can be gathered from the words employed by him in his will. In this case the testator describes property which cannot exist, for the reason that he could have possessed no land between his northeast corner and the south line of any other real estate. I have not lost sight of the fact that, according to the plat introduced in evidence, by construing the language used to read as follows:

“(3) ‘I give and devise unto John Nuhse the northeast quarter of the southwest quarter; also all property which I own on the east side of the county road in the northwest quarter of the southwest quarter of section thirty-three, township thirty-one north, range six E. W. M.’ and if I should also construe the language with reference to the property conveyed to Mrs. Anna Peterson and Mrs. Mark Bartlett as follows:

“(4) ‘The southwest quarter of the southwest quarter of section thirty-three, township thirty-one north, range six E. W. M.; also all property lying on the west side of the county road in the northwest quarter of the southwest quarter of section thirty-three, township thirty-one north, range six E. W. M.’ the will would dispose of all real estate which the testator owned at the time of his death.

“(5) However, it occurs to me that the court would be practically making a will for the testator to give it the construction above suggested. If the testator was in a mental condition to dispose of his property, I can see no reason or excuse for his not giving a better description of it than he has.

“(6) Under the evidence he owned no property in the northwest quarter of the section mentioned; neither did he own any property on the east side of the northwest quarter of said section. If, as a matter of fact, the court should add to the description and make it read:

“(7) ‘Also all property I own on the east side of the northwest quarter of the southwest quarter of said section,’ that would include the northeast quarter of the southwest quarter of said section, but it would not

include any part of the northwest quarter of the southwest quarter.

“(8) There is no residuary devise in the will. However, the same rule would apply, in my opinion, in the construction of the will that would were there a residuary devise, since all property not disposed of by the will descends to the heirs at law. The law makes a very equitable disposition of property where one dies without a will, and I think, before one should be permitted to change the descent of his property by will, he should do so in a way that would enable the court to determine, from the language employed, how he intended to dispose of his property. He should also do so in a way that would indicate that he appreciated what he was doing. That, in my opinion, the testator in the case under consideration, has not done. Therefore, I shall hold that he died intestate as to the north half of the southwest quarter of section thirty-three, township thirty-one, north, range six E. W. M.”

Section 1339, Rem. Code, which was reenacted (Laws of 1917, ch. 156, p. 653, § 45), is as follows:

“All courts and others concerned in the execution of last wills shall have due regard to the direction of the will, and the true intent and meaning of the testator, in all matters brought before them.”

We held in *Webster v. Thorndyke*, 11 Wash. 390, 39 Pac. 677:

“If of two constructions of an instrument one will give effect to all the objects which it is evident were sought to be accomplished by its execution, and another will not, the one which will should be adopted, if the language used can be so interpreted as to allow such construction.”

The right to dispose of one's property by will is a valuable right and will be sustained when possible. *Points v. Nier*, 91 Wash. 20, 157 Pac. 44; *Pond's Estate v. Faust*, 95 Wash. 346, 163 Pac. 753; *In re Murphy's Estate*, 98 Wash. 548, 168 Pac. 175.

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While there are cases found in the books strictly construing such devises against the devisor for uncertainty and indefiniteness, we are disposed to as liberal a construction as possible to effect the carrying out of the intention of a testator, when possible to determine it from *all* the surroundings and context of the devise.

From a reading of the will in this case, the intent of the testator is apparent that he desired to dispose of all his property. It is our opinion that the will should have effect and be given that construction as set forth in paragraphs 3 and 4 of the trial judge's memorandum decision above quoted.

Reversed and remanded for entry of judgment as herein indicated.

MOUNT, CHADWICK, and MAIN, JJ., concur.

ELLIS, C. J. (dissenting).—What the testator intended by the language used seems to me a matter of conjecture. It seems to me that the majority have rewritten rather than construed his will. I therefore dissent.

[No. 14533. Department Two. April 27, 1918.]

VERNA ROCKWELL, *Respondent*, v. J. W. DAY,
Appellant.¹

SEDUCTION—PROMISE OF MARRIAGE—NECESSITY. Where seduction is alleged under promise of marriage, or the promise is required by statute, it must be shown that the necessary promise existed at the time of the seduction.

SAME—PROMISE OF MARRIAGE—EVIDENCE—SUFFICIENCY. A promise to "take care" of a woman of mature years who has voluntarily submitted herself to sexual intercourse, and who has been married and knows what it means to be "taken care of" after illicit cohabitation, is not a sufficient promise of marriage to sustain an action for seduction, especially where there was no impediment to marriage, the parties lived together openly and consent was not obtained by promises which made the struggle unequal when measured by age, experience, and other attending circumstances.

SEDUCTION—CIVIL ACTION—ACCRUAL—LIMITATIONS—CONTINUING RELATIONS—ABANDONMENT. A right of action for seduction under promise of marriage accrues at the time the promise is made; and granting that it would continue until the illicit relations are broken off and three years thereafter, such relations must be continuous, and if abandoned and returned to under no new promise, the statute began to run at that time, and the action must be brought within three years after such an abandonment.

Appeal from a judgment of the superior court for Spokane county, Mitchell, J., entered July 5, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action for seduction. Reversed.

Voorhees & Canfield, for appellant.

C. E. Ellis and *Chas. W. Gillespie*, for respondent.

CHADWICK, J.—Plaintiff brought this action to recover damages for seduction. The jury returned a verdict in her favor, and the defendant has appealed. The assignments of error principally relied on are that the action is barred by the statute of limitations and

¹Reported in 172 Pac. 754.

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that the facts are not sufficient to sustain the verdict and judgment. These questions were preserved throughout the trial by appropriate pleadings and motions. Plaintiff alleges that the seduction occurred on or about the 9th day of April, 1909, and that the meretricious relations then begun continued until on or about the 20th day of December, 1913. This action was begun on the 5th day of December, 1916. It is the contention of defendant that the statute began to run on the 9th day of April, 1909, and that an action would be barred on the 9th day of April, 1912. He cites Rem. Code, § 159, which makes no exemption in favor of this class of actions, and the following cases: *Wilhoit v. Hancock*, 5 Bush (68 Ky.) 567; *Dunlap v. Linton*, 144 Pa. St. 335, 22 Atl. 819; *Davis v. Boyet*, 120 Ga. 649, 48 S. E. 185, 102 Am. St. 118, 66 L. R. A. 258.

See, also, *People v. Nelson*, 153 N. Y. 90, 46 N. E. 1040, 60 Am. St. 592; *People v. Clark*, 33 Mich. 112.

Plaintiff insists that the better rule is that the statute does not begin to run, where improper relations are begun under a promise of marriage, so long as the relations are continued, or until the last act of intercourse, that all the acts of intercourse are one transaction and that a continued promise of marriage is implied from time to time. She relies on *Davis v. Young*, 90 Tenn. 303, 16 S. W. 473, and on *Ferguson v. Moore*, 98 Tenn. 342, 39 S. W. 341; *Gunder v. Tibbits*, 153 Ind. 591, 55 N. E. 762; *Breiner v. Nugent*, 136 Iowa 322, 111 N. W. 446; *Baird v. Boehner*, 77 Iowa 622, 42 N. W. 454; *People v. Millspaugh*, 11 Mich. 278. The general rule, as most text writers agree, is that the statute begins to run from the time of the seduction, where the action is maintained by the woman on her own behalf. Wood, *Limitations* (2d ed.), § 186; Burdick, *Law of Torts*, § 273; 35 Cyc. 1308, and 25 Am. & Eng. Ency. Law (2d ed.), p. 224. But whether we call

the one or the other the general or the better rule, it must be admitted that there is a very marked conflict of authority. We could base our opinion on either rule and sustain it by sound reason, for if the one rule protects the artless and confiding female, the other protects the man from the artful pretensions of women who may pretend to have been seduced in order to obtain a pecuniary compensation or to hide a shame revealed by a subsequent pregnancy, and who may fortify their pretensions by a showing of continued illicit cohabitation as a circumstance to sustain the charge of seduction under a promise of marriage or by arts, persuasions or promises.

There is an equity in cases of this character, it is noted by Mr. Cooley in *Watson v. Watson*, 53 Mich. 168, 18 N. W. 605, 51 Am. Rep. 111. In many of the cases it is confessed without notice. This court in the case of *State v. Carter*, 8 Wash. 272, 36 Pac. 29, upheld a seemingly improbable and untruthful statement of her case by the prosecutrix because of her "tender age." But if there be no equity, a case of seduction brought by a woman of mature years calls for cautious inquiry, holding fast to the law's first aid, common sense.

The facts in many of the cases seem to have called for a rule that would allow or defeat the action according to the justice of the particular case. Our thought may be illustrated by reference to *Franklin v. McCorkle*, 16 Lea (84 Tenn.) 609, opinion on rehearing, later overruled in *Davis v. Young*, 90 Tenn. 303, 16 S. W. 473. In the one case, the justice of the case was with the defendant; in the other, the justice of the case was with the plaintiff. It was so in the state of Indiana, where, in an earlier case, the court held that the statute began to run from the first act of seduction. In a later case, where it was clear that the woman had

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been made the victim of the man, the rule was held otherwise. *Gunder v. Tibbits, supra*.

We therefore, at this time, hesitate to lay down any rule that would be a guide for all cases, nor is it necessary as we view the facts in this case.

Plaintiff alleges in her complaint, and counsel sought diligently to prove at the trial, that she had been seduced under a promise of marriage and that the relations of the parties had been continued under that promise. We have studied the facts diligently and are convinced that, if the case cannot be sustained upon a promise of marriage, it cannot be sustained at all, for the "solicitation, persuasion and promises" of defendant do not, considering the age of the plaintiff and her understanding, make out a case of seduction. Moreover the rule is:

"Where the seduction is alleged to have been committed under a promise of marriage, or where such a promise is required by statute, it must be shown that the necessary promise existed at the time of the seduction, etc." 25 Am. & Eng. Ency. Law (2d ed.), 239.

Plaintiff was 49 or 50 years of age at the time of the trial, 1917. She says the seduction occurred in April, 1909, so her age then was about 42. She was married in the year 1885, her husband died in 1907. She has two grown daughters, one of the age of nearly thirty years, and the other eighteen months younger. Plaintiff knew defendant before her husband died. They came together thereafter in a business or social way. Their association gradually grew more friendly and their relations more intimate. Defendant called frequently at plaintiff's rooms at the several hotels and lodging houses in which she resided. In the fall of 1908, she became ill and went to a hospital. Defendant called on her there; he paid her bill, and finally, at her request, removed her to the home of her niece. From

the first early days of the friendship and association of these people, defendant constantly and persistently importuned plaintiff to submit to sexual intercourse. According to the story of the plaintiff, and we are following her testimony as closely as we can, he let no opportunity pass when they were alone to "love her up in most every way a man can a woman"; to kiss, caress, fondle and pet her, and at least on one occasion, as she says, he tried every way he could to "get his hand up under my clothes." The positions of the parties in this battle were so clearly defined, and if plaintiff was possessed of the understanding of the ordinary human being and the natural modesty of womankind, she must have understood that defendant had no honorable intention or high-minded purpose to love and cherish her. He was resolute in his purpose to conjugate with her, and she was willing to be fondled, caressed and "loved up" by a man who brought no appeal other than to the brutish instincts of the object of his lascivious desire. Knowing this situation, the attitude of defendant, and the possible consequence of further association, plaintiff, after some slight disagreement with her niece, and at the suggestion of defendant, went to work for him in his office. Defendant secured a room for her in a hotel or rooming house known as the Minnesota block. She stayed in the office during the day; defendant was a frequent caller by night. Their association was constant, and defendant was insistent when they were alone. He was always fondling and caressing her. The inference from her testimony is that defendant's sexual desire was the outstanding topic of conversation. There was no formal promise of marriage or artful persuasion that a woman over forty years of age and the mother of grown children could urge as a seductive influence.

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She had exacted no promise of marriage, and defendant had made none. Her story is:

"He would come to the office every few minutes or every short time from the shop and come in there and he would make love to me and caress me in every way that a man could to a woman to show his affection for her; and he said he cared more for me than any woman he had ever met. He kissed me there in the office many a time and he has made reference to sexual intercourse there. He used to try to get me—he had his room in the back part of the office and he used to try to get me to go in there in his room and his bed with him. That occurred very many times, and at those times he promised me that he would care for me and we would be friends, and after a while when we got better acquainted, he says—that was the beginning of our acquaintance, the first year—he said, 'after we get better acquainted' and so on, he says 'we will have a happy home.' "

Plaintiff went to Seattle just before Christmas, 1908. At that time the virtue of plaintiff was triumphant, the vice of defendant had been baffled. Plaintiff returned to Spokane about the 20th of January. She took a room at a hotel; the next day she telephoned defendant. She threw out a skirmish line. Defendant chided her because she had not called him as soon as she had arrived, saying:

"I suppose you had some other man at your room Saturday night and you didn't want me to know you were there."

Plaintiff was not repelled by this burning insult to chastity. The next day she went to defendant's office. He caressed her, drew her down upon his lap, and said "You are in trouble and have got to tell me what it is." She then told defendant she was in trouble concerning a piece of property. Defendant procured counsel for her; she went to his office right along, because, as she says, he was assisting her in the litigation over

her property. During this time the enemy was busy. The drive was on.

"He made advances in regard to sexual intercourse. He always tried to get me to submit to him from the beginning. I don't know as anything occurred in relation to his promises to marry me."

Plaintiff describes the persuasions and promises made before she went to his office to work.

"He was very affectionate. When sick, he showed great affection and sympathy. He treated me kindly. I can remember more what he done than what he said. He made love to me. He caressed me. He sat down on the bed and loved me up. I don't know that I can particularly state the words that he said. He kissed, he petted me. He made love to me every way he could that night and tried to persuade me to lay down on the lounge with him there."

"Q. And did he state anything about marriage? (Objected to as leading.) Q. Well, just state what was said then. A. He said that if I would submit to him he would care for me, and that I was not able to work. I was sick and I didn't have the means to take care of myself and he would see that I was taken care of and he would do all he possibly could for me."

After going to the office:

"He made love to me and caressed me in every way that a man could to a woman. He said he cared for me more than any woman he ever met. He kissed me. He tried to get me . . . to go into his room and bed with him. . . . Q. Make any promises? A. Well, yes, he promised me that he would care for me and we would be friends, and after while when we got better acquainted, he says—that was the beginning of our acquaintance, the first year—he said 'after we get better acquainted' and so on, he says 'we will have a happy home.' He called me affectionate names. Q. Did he make any promises at that time in regard to marriage? (Objected to.) Q. Just state what, if anything, occurred in that respect? A. Well, I don't know

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as anything particular occurred in any way only that we were together out there most of the time."

Plaintiff says she submitted her person to the embrace of defendant on the 9th day of April. Her version of her final capitulation is quoted from the unchallenged abstract of her testimony.

"The way that occurred is this: He was at my room every evening, we were together every evening mostly, and he came up one evening and he asked me if I would get supper for him, if he would go down and get some—I believe it was oysters and crackers that he asked me to cook that night—we would eat supper together that night, and I said I would. So we were together that evening until some time late, and the next evening he was up there again, the second evening he was up there again. And I don't remember right now whether we ate our dinner together that evening or not; but the third evening that he was up there he came up there and we had dinner and then after that why, he read the paper while I was washing the dishes, doing my work; and after that we spent the evening visiting together in the usual way that most anyone would, until it began to get late he kept insisting on that he was not going home, he was going to go to bed; I told him the best thing he could do was to get back to the office; I told him my character was all that I had left—after that was gone I had nothing left. He stayed there and coaxed and promised that I was not able to work, that he would take care of me and we would have a home, that I would have plenty if I would take care of him, that I wouldn't have to work. He said that he would care for me, he would see that I would have a home, I wouldn't have to work as my financial affairs were limited at that time, my health was poor. He stayed there, I guess it must have been about eleven o'clock or so, he finally promised that he would never throw me down; he said if I would submit to him he would stay with me through thick and thin; he said he would never throw me down, he would throw down all the rest of the women he was going with, which he said was five right now, that he was going with at that time, he

said he would stay by me. (St. p. 22.) I suppose my conduct towards him must have been very affectionate. There was discussion about marriage at that time. The subject of marriage had not come up very frequently, but it did later on. About the 9th day of April I submitted to sexual intercourse with him. I don't know that the subject of marriage was discussed between me and Mr. Day right after this certain time, but later on—it was very soon afterwards. We discussed marrying before we had sexual intercourse the first time, the first evening he came up there during this, the third evening that we had the intercourse. Then he made me promises that he would care for me, as I have explained before, and he says 'If you will submit to me' he says 'we will never aim to part.' 'Well' I says, now, as I explained my character was all I had; he said 'That will not hurt your character with anybody. I will take you and take care of you and protect you.' I met him every evening after that because he was at my room. After that one certain evening, why, they was most all the time that we had intercourse together a good deal of the time after that. His demeanor towards me was just as affectionate as any man could be. He did kiss me. (St. p. 23.) I met him often after we had this intercourse. We lived together."

A promise to "take care" of a woman, made under some circumstances, might be tortured into a promise of marriage, but a woman of mature years who has voluntarily submitted herself to unrighteous solicitation for several months, and who knows what marriage is, and what a promise of marriage is, and the possible consequences of illicit cohabitation, and what it means to be "taken care of" after illicit cohabitation, who comes relying upon such a promise, should be held to proof more positive than mere inference.

On the 10th day of April, 1909, the defendant moved into the rooms of plaintiff and the parties immediately set up housekeeping. After a time they moved to the Kansas House, and then back to the Minnesota House,

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afterwards the parties went to live in a house owned and maintained by defendant on Mallon avenue, and thereafter lived at a place owned by plaintiff at Ross Park, and thereafter at a place out on College street, and again at the Mallon Avenue house. They so far maintained the ordinary domestic routine that they sometimes quarreled, and finally their relations were entirely broken off. When this occurred plaintiff was pregnant.

While a formal promise of marriage is not an essential fact to be proved under the laws of this state to sustain a charge of seduction, the lack of such a promise, when considered in the light of all the testimony, may be a strong and even controlling circumstance in a civil action for damages. For eight months prior to the alleged seduction plaintiff knew of the attitude and purpose of defendant, and if marriage was talked about, as she says it was, it was not suggested in a way that would overcome the natural modesty and virtuous instincts of a woman of chaste character. She does not anywhere say that she invited defendant to fulfill the promise prior to the time of the seduction, or at all.

"It is a little remarkable, if the girl relied upon a promise of marriage, that after she found herself pregnant she should never have demanded or even asked marriage." *People v. Millspaugh*, 11 Mich. 278, 283.

There was no impediment to marriage, either physical, moral or legal; a license could have been obtained and the ceremony performed at any time during the months between August, 1908, and April, 1909, or within any time during the four years and nine months following. The auditor's office was only a few blocks distant and there were parsons in plenty. Plaintiff knew the law and could have protected her chastity by the very simple expedient of making the surrender of her favors legal. This is not a case of a young woman suf-

fering under an impediment of minority or the non-consent of parents, nor is it one where the woman has been carried away by the torrential flow of the hot blood of youth. The undoing of plaintiff, by her own account, as we have seen, was deliberate and formal. This was no secret liaison. The lives of the two ran on in contentment. They lived together openly. Defendant provided the home and fed and clothed plaintiff and she performed the usual duties of the housewife. They were affectionate one with the other. The world will ask, and why not the law, why, if there was a promise of marriage, it was not carried out, or at least a demand that it be performed.

Proof of intercourse is not in itself sufficient to sustain a charge of seduction. It is necessary to go further and show that the consent of the female was obtained by promises which, when measured by the age and experience of the parties and every other attending circumstance, makes the struggle between vice and virtue unequal. The law of seduction rests upon a faith in female chastity, and although the case of a plaintiff is attended by a general presumption that she did not willingly lend her body to improper uses, for "Chastity is the general law of society; a want of chastity the exception" (*Crozier v. People*, 1 Park. Cr. Rep. (N. Y.) 453; *State v. Jones*, 80 Wash. 588, 142 Pac. 35), this presumption is not absolute. It does not continue forever. It is attended by a presumption equally necessary to the administration of justice, and that is, that judgment and discretion come with age and experience, and that a woman so fortified will not readily yield to the wiles of a seducer. Her testimony will be more closely scrutinized than that of a younger or more inexperienced woman, for the statute is for the protection of the pure in mind, for the innocent in heart, who may have been led astray or seduced from

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the path of rectitude. *Andre v. State*, 5 Iowa 389, 68 Am. Dec. 708. So where it appears that the woman complaining is of mature years and as worldly wise as is her paramour, the law will hold her to a stricter degree of proof than a younger woman with less experience. She must show more than an illicit relation, she must make it reasonably clear that the citadel of her virtue fell because of something that is more than an appeal to her lust and passion or to her mercenary instincts.

“There should be something more than a mere ‘reluctance’ upon her part to commit the act. It should be a reluctance that enticements and persuasions could not overcome without the presence of some other potent influence; such a state of facts should be proved as would convince a fair-minded person that she had been deceived and deluded, and that her submission was in consequence of such deception and delusion. To term coaxing and persuasion of a woman to yield to the lecherous embraces of a man ‘a seduction by artifice,’ would be a misnomer; a virtuous minded woman would promptly spurn such approaches with indignation. And if the statute is to receive the construction last indicated—if a woman of mature years is allowed to recover damages for the loss of reputation and character in consequence of her having permitted a man to have carnal knowledge of her—she should be required to show that she had been prudent; had exercised at least ordinary discretion; had sacrificed her virtue through an influence that was calculated to lead astray an honest minded female. An action for obtaining property fraudulently cannot be maintained without proof of facts calculated to deceive a person of ordinary prudence; and how can a female a long way beyond girlhood claim to have been defrauded of that which every womanly instinct of her nature prompts her to set the highest value upon, by ‘flattery, false promises, artifice, urgent importunity, based upon professions of attachment,’ unless they are of such a character as are calculated to mislead an ordinarily prudent and virtuous

mindful woman?" *Breen v. Henkle*, 14 Ore. 494, 13 Pac. 289.

The case of *Baird v. Bohner*, 72 Iowa 318, 33 N. W. 694, was very like the one at bar. The illicit relations were brought about in about the same way; they were broken into for a time and later renewed; they covered a period of about two years. In that case, defendant threatened to go with another woman; in this case, defendant promised to give up other women. The court refused to let the verdict stand, saying:

"For the purpose of this opinion, it will be conceded that there was evidence tending to show that the plaintiff had reformed, and was of chaste character in June, 1883. The first time defendant was in company with the plaintiff after her return from Kansas he made an improper proposal to her, and took indecent liberties with her person, that should have shocked a matured woman of chaste character. He proposed sexual intercourse, which she refused, and she objected to the liberties taken with her person. There was, however, no show of indignation on her part at either the proposal or liberties taken. He kept coming to see her, and told her that he loved her, and she thought that if she did 'not give up he would marry her'; and he told her 'If you don't do as I want you to I will go with some other girl.' She then was clearly and explicitly advised that his object in visiting her was to obtain sexual intercourse. This was before the claimed seduction took place. Knowing his object, she permitted him to visit her frequently, and he finally 'accomplished his purpose by telling her he would abandon her, and go with some other girl, and if she would submit to him, he would stick to her.' The plaintiff, therefore, being a chaste woman, yielded her person to the embrace of the defendant, knowing all the time that his object in visiting her was to obtain sexual intercourse, simply because he told her if she did not yield to him he would abandon her and go with some other girl; that is, that he would cease to visit her. It must be remembered that there was no promise of marriage. What was said

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in relation to marriage was said in September, and the claimed seduction took place in the preceding month of June; nor was there any false promise of any kind. His declaration that he would abandon her or cease to visit her clearly cannot be regarded as a false promise, deceit or artifice. It is true, there is evidence tending to show that he loved her, and that she loved him, and that he said 'she had a pretty form, was very kissable and had pretty eyes.' Whether this was said before or after the claimed seduction does not appear, but, conceding it was before that time, sexual intercourse was not obtained because of the expression of love, or by reason of flattery. It was not for these reasons that she yielded."

From the whole testimony, we think it clearly appears that plaintiff did not surrender her person because of any promise reasonably calculated to mislead a chaste woman. Her fortress did not fall by reason of any sudden assault. She was not shocked by defendant's declared purpose or his sensual conversation. She went away from him but returned again and again. She left on one occasion, at least, resolved that she would not return to her adulterous life.

We have not discussed the record and quoted from the cases so much to justify our belief that the court should have withheld the case from the jury, or that the jury should have decided in favor of the defendant, as to demonstrate that the case should not be held to fall within the rule of the Indiana and Tennessee cases, whatever the rule hereafter adopted by this court may be.

An action for tort accrues at the time the wrong is committed. This rule is universal unless modified by statute, as, for instance, the statute allowing an action to be brought within three years after a fraud is discovered, or where the courts have arbitrarily worked an exception, as has been done by some of them in seduction cases. As a premise we can agree that plaintiff

had a right of action on the 9th day of April, 1909, if at all, and we may grant that it would continue until the relations were broken off and for three years thereafter. But the application of this rule demands that such intercourse be continuous and referable, directly or by fair implication, to the original promise, and that the loyalty of the woman to her expectation of marriage be unbroken. A woman who abandons her shame and makes a resolution not to return to it, but who does return voluntarily and under no new promise, can hardly be said to be in a position to invoke the unwritten equity which has been voiced in the opinions relied on. Plaintiff left defendant in May, June, or July, 1912, and went to Portland. She says:

"I returned in September. When I returned I went out to my own house at Ross Park. Mr. Day called to see me there. He came out there and stayed all night. I hadn't any intention when I came home of living any more with him."

Plaintiff did not exact a renewal of the promise to marry, if any was ever made, and there is no showing of shame or anxiety over her situation for more than four years thereafter, when this suit was brought. Under these facts, it would do violence to every rule of law to say that plaintiff was not bound to bring her action within three years after September, 1912, for at that time, and after a voluntary surrender of her obligation to Hera, she made of herself a willing sacrifice upon the altar of Aphrodite.

We are not justifying the wrong of defendant. His conduct has been neither moral nor legal. But the law gives no remedy or damages for illicit cohabitation, or even for seduction under a promise of marriage, unless it is brought within three years after the cause of action has accrued or, *semble*, the relations have been broken off. Plaintiff ceased to be a seduced person cohabiting

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under a continuous promise, if ever she was, in September, 1912. When she turned back on the path of chastity which she had determined to follow, she dropped the bar and set the statute to run.

Reversed and remanded with directions to enter a judgment notwithstanding the verdict.

ELLIS, C. J., HOLCOMB, MOUNT, and PARKER, JJ., concur.

[No. 14587. Department Two. April 27, 1918.]

A. C. EDWARDS *et al.*, Appellants, v. J. H. HEATON
et al., Respondents.¹

VENDOR AND PURCHASER—FORFEITURE—PAYMENTS—EXTENSION OF TIME—CONSTRUCTION. A three-year extension of time for the payment of installments "hereinafter to become due" on a land contract given in consideration of an agreement that the vendee and another should take over the purchase of certain property and divide the profits with the vendor, cannot be relied upon to prevent forfeiture of the contract for nonpayment of installments, where (1) there was at the time the extension was made an overdue payment not included in the terms of the extension "hereinafter to become due," and (2) where there was a failure to comply with the conditions as to purchasing the other property and dividing the profits.

SAME—REMEDIES OF VENDOR—FORFEITURE—RELIEF FROM—EQUITY. In such a case, where default in payments were due to a misconstruction of the extension agreement, equity will not enforce an unconditional forfeiture of the contract at the suit of the vendor, where the remedy would be a harsh one, but will give the vendee an opportunity to pay up on the contract.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered September 5, 1917, upon findings in favor of the defendants, in an action for equitable relief, tried to the court. Reversed.

Williams & Davis and *A. C. Edwards*, for appellants.
Bausman & Oldham, for respondents.

¹Reported in 172 Pac. 839.

FULLERTON, J.—On April 8, 1915, the appellants, Edwards, and the respondent Heaton entered into a written contract by the terms of which the appellants agreed to sell, and the respondent agreed to buy, a certain described tract of real property containing about seventy-three acres, situated in Snohomish county. The contract, after reciting that a substantial part of the contract price of the land had been paid, further recited that there remained a balance due thereon of \$2,200, which the purchaser agreed to pay in yearly installments of \$200 each, the first installment to be paid one year after the date of the contract and the remaining installments yearly thereafter, with interest on all deferred payments at the rate of seven per centum per annum payable semi-annually.

The contract contained, among other conditions, the following:

“But in case of default in the payment of the said principal sum or part or portion thereof, or interest or part or portion thereof, or in any term or condition herein contained, the times of payment being hereby declared to be the essence of this agreement, then, or in any such event or events, first parties, their heirs or assigns, shall have the right to declare this agreement to be null and void, after 30 days notice, and all sums as may have been paid on account of said purchase price, and any and all rights and interests of all kinds in and to the said premises or part or portions thereof that may not have been deeded at the time of such default, and all rights and interests of the second party, his heirs or assigns, shall utterly cease and determine, as absolutely, fully and perfectly as if this agreement had never been made.”

The contract also contained the further provision that the purchaser might sell parts or portions of the land in tracts of five acres or more at prices stated, for which the appellants would issue deeds on the pay-

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ment to them of the purchase price, the moneys received to be credited by them upon the purchase price.

Within three or four days after the execution of the principal contract, the respondent Heaton entered into a contract with the defendant John H. Flora, by which he agreed to sell to Flora some forty acres of the land. This contract is not set forth in the record, nor was its purport generally shown. It appears, however, that Flora entered into possession of the land and made valuable improvements thereon. Seemingly, also, the defendant Luthi, by an arrangement with Heaton, acquired some interest in the land; this interest, however, was not shown and is not involved in this proceeding. Later on, Flora desired to resell his interests to Heaton, and he and Luthi took the matter up with the appellant, Edwards. The negotiations led to a proposal by Edwards, on which Heaton and Luthi indorsed their acceptance. This appears in the record in the following form:

“Everett, Washington, April 22, 1916.

“Messrs. E. S. Luthi and J. H. Heaton,

“Lakewood, Washington.

“Gentlemen:—In consideration of your taking over and purchasing the J. H. Flora property in lot 3 and the southeast quarter of the southeast quarter of section 23, township 31 north, of range 4 east, at a price of \$2,300, and for the further consideration of an agreement that the property shall be sold at the best price obtainable, and the profits thereon divided equally between the undersigned and yourselves, I agree that in the event it is not convenient for you to pay the payments hereafter to become due to me on my contract to you for the sale of the land, that an extension may be granted for a reasonable period, not exceeding three years, in which payments may be made.

“In case it becomes necessary to make payments to J. H. Flora on his interest, it is agreed that the under-

signed shall pay one-half of the same as it becomes due.

"Approved:

A. C. Edwards."

"E. S. Luthi

"John H. Heaton."

Following the acceptance of the proposition made, Heaton individually repurchased the property from Flora. The terms of this purchase were not shown in their entirety. While it appears that Heaton agreed to pay therefor the sum of \$2,405, it was not shown how much of a cash payment was required to satisfy Flora. He owed something as a balance due on his contract with Heaton, which was deducted from the total price agreed to be paid, but the amount remaining due does not appear. Heaton, in his answer, set forth that, in the repurchase, it was necessary to make payment to defendant Flora, and that he did make a payment to him of \$255, but does not say whether or not this was all that was due Flora, and his evidence is no more definite. It did appear clearly, however, that Luthi acquired no interest in the land by the repurchase as made, and that, subsequent thereto, no agreement, either oral or written, was entered into between the three parties or considered by them by which the land repurchased was to be sold for their mutual benefit and the profits divided between them, nor was any such agreement entered into or considered between Heaton and Edwards individually.

The first installment of the principal sum due under the main contract was paid by Heaton sometime before it fell due. He did not pay the semiannual installment of interest falling due on April 8, 1916. This amounted to \$70, and Edwards began pressing for its payment. On May 9, 1916, Heaton wrote Edwards concerning this payment, in which letter he referred to a conversation between them and to his repurchase of the Flora interest, and stated that he gathered therefrom that

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this payment was not to be pressed. To this Edwards answered to the effect that the matter might rest for a while. Heaton did not subsequently make the payment, nor did he pay the semiannual installment in a like sum falling due on October 8, 1916. Because of the failure to make these payments, Edwards served notice of forfeiture on Heaton; pursuant to the terms of the contract, on December 14, 1916. Later on he brought the present action to declare a forfeiture and to free the lands from the apparent lien of the contract. Heaton defended on the ground that payments under the contract had been extended for a three-year period by the subsequent proposal of Edwards and its acceptance by him of date April 22, 1916. The trial court took this view of the matter and refused to adjudicate a forfeiture. It took the view also that Edwards was obligated to pay one-half the sum Heaton had paid Flora, and entered a judgment against Edwards and in favor of Heaton for that sum.

It seems to us that the conclusion of the court is erroneous. In the first place, the proposal by its very terms does not include the installment of interest falling due on April 8, 1916. It is dated April 22, 1916, and refers to payments "hereinafter to become due"; so that, in any event, there was default as to this installment. In the second place, we cannot conclude there was such a compliance with the terms of the proposition made as to postpone the due dates of the remaining installments. The proposal and its acceptance did not alone constitute an agreement to postpone the payment of these installments for the period therein named. It was made subject to the condition that Flora's interest be purchased by Heaton and Luthi together, that the price paid Flora for his interest should not exceed \$2,300, and that the property be sold for the best price obtainable and the profits made thereby

be equally divided between Edwards on the one part and Heaton and Luthi on the other. The record falls far short of showing a compliance with these conditions. The land was purchased by Heaton alone at a price exceeding the agreed price, and there was no sale of the land nor tender of any agreement under which it could be sold and the profits of the sale divided. As we view the record, Heaton first regarded the purchase as one made in his own behalf and for his sole benefit, and asserted the contrary only after the notice of forfeiture was served upon him, and even then did not tender the land to be sold in accordance with the terms of the proposal. This was not sufficient to make the agreement to postpone the installments obligatory upon the party making the offer.

But notwithstanding we think Heaton was in error in his construction of the effect of the proposed agreement, we cannot think that the remedy sought by appellant should be granted according to the strict prayer of his complaint. While the remedy sought is within the terms of the contract, it is nevertheless a harsh one, since it cuts off all rights Heaton has in the contract and works a forfeiture of the installment paid. This should not be done except in a case where the litigant has forfeited all right to equitable consideration. We have concluded, therefore, to remand the cause with instructions to the trial court to ascertain the amount due upon the contract at the date of the remittitur and grant the respondent Heaton a reasonable time, not to exceed sixty days, in which to pay the amount found due. If payment is made within that time the action will be dismissed at Heaton's costs; if he fails to pay, a decree will be entered against him according to the prayer of the complaint.

Reversed and remanded accordingly.

ELLIS, C. J., CHADWICK, MOUNT, and HOLCOMB, JJ.,
concur.

[No. 14706. *En Banc*. April 27, 1918.]

THE STATE OF WASHINGTON, *on the Relation of Tacoma
Railway & Power Company, Plaintiff*, v. PUBLIC
SERVICE COMMISSION *et al.*, *Respondents*.¹

STREET RAILROADS—REGULATION BY PUBLIC SERVICE COMMISSION—
APPEAL—REVIEW. The findings of the public service commission
upon hearing a contest over street railway rates must be taken as
true on appeal, where the evidence is not brought up.

SAME—REGULATION BY PUBLIC SERVICE COMMISSION—FRANCHISE
CONDITIONS—ABROGATION—POWER OF COMMISSION—STATUTES. Under
Rem. Code, § 8626-53 of the public service commission law, which
provides that the public service commission may determine and
regulate just and reasonable rates, facilities, and service where the
same is unjust or unreasonable or the fares or charges insufficient
to yield a reasonable compensation for the service rendered, and
may fix the same by order, does not authorize the public service
commission to relieve from or abrogate provisions of a street rail-
way franchise imposed by the city prior to the adoption of the
public service law, and requiring the company to pave between its
tracks, contribute to the cost of bridges and pay a percentage of
its gross receipts, and carry city employees free, under Rem. Code,
§ 7507, vesting the city with the whole of the state's police power
as to the use and control of its streets; notwithstanding the com-
mission finds that the service is inadequate and the income of the
company not sufficient to pay a reasonable return on the property
devoted to the public use; since the public service commission law
does not expressly or by necessary implication confer power to deal
with the question of franchises or to modify conditions previously
imposed, and such intention is not indicated by the language of the
act, or the history of the legislation, which shows a rejection of a
proposed law granting such power.

CARRIERS—STREET CAR FARE—REGULATION BY PUBLIC SERVICE
COMMISSION—STATUTES. Under the public service commission law,
which provides (Rem. Code, § 8626-9) that fares shall be just, fair,
reasonable and sufficient, and that every common carrier shall pro-
vide "adequate and sufficient service" and (Id., § 8626-53) that the
public service commission shall have power to regulate fares and
service, and determine and order the same where if unjust or unre-
asonable or the fares or charges are insufficient to yield a reasonable
compensation for the service rendered, and (Id., § 8626-25) that no
street railroad company shall charge or collect more than five cents
for one continuous ride within the corporate limits, the public serv-

¹Reported in 172 Pac. 890.

ice commission has no power to increase the fare which a street railway company may charge within city limits to more than five cents, although that sum is found insufficient to pay a reasonable return on the property devoted to the public service and provide an adequate and sufficient service; since to harmonize the various provisions of the act, it must be construed as intending to give power to regulate rates so long only as it does not exceed the limit of five cents expressly fixed by § 8626-25 of the act.

Application filed in the supreme court March 5, 1918, for a writ of mandamus to compel the public service commission to exercise jurisdiction looking to the relief of plaintiff from certain street railway franchise provisions and increasing the rates charged for the carriage of passengers. Denied.

James B. Howe and F. D. Oakley, for relator.

Lyle & Henderson, for respondent Blaine.

Fitch, Jacobs & Arntson, for interveners Bloomberg *et al.*

The Attorney General and Hance H. Cleland, Assistant, and *U. E. Harmon, Frank M. Carnahan, J. M. Geraghty, D. W. Featherkile, and Hugh M. Caldwell*, amici curiae.

MAIN, J.—This is an original application in this court for a writ of mandate directed to the public service commission. The petitioner, the Tacoma Railway & Power Company, is a corporation, and is now, and has been for a number of years last past, engaged in operating a street railway system in the city of Tacoma under certain franchises granted by that city. In May, 1917, J. E. Bloomberg and others filed a complaint with the public service commission claiming that the service given by the street car company upon certain streets was inadequate and not sufficient, and asking that the company be required to give an adequate and sufficient service. This complaint was answered by the company and a hearing was had before the commission. After

the hearing, the commission found that the service complained of was inadequate and insufficient, but declined to order that the service be improved, because the income of the company was not sufficient to pay a reasonable return on the value of the property devoted to the public service unless the company could be relieved of certain franchise provisions or be permitted to charge a fare of more than five cents for one continuous ride within the corporate limits of the city. The majority of the commission was of the opinion that it had no power either to relieve from the franchise provisions complained of or to authorize a fare of more than five cents per passenger within the corporate limits of the city. The commission thereupon declined to order an adequate and sufficient service and dismissed the cause. For the purposes of this case, findings of the commission must be accepted as true, since the evidence upon which the findings are based is not before us.

Whether the writ prayed for should be issued depends upon whether the public service commission, under the authority conferred upon it by the public service commission law, has the right to relieve from franchise provisions or direct that a fare greater than five cents may be charged. If it has such power, the action of the commission in dismissing the complaint for want of jurisdiction was erroneous, and the writ prayed for should issue. If the commission has not been given power by the public service commission law to either modify franchise provisions or increase the fare to more than five cents, the writ prayed for should be denied. The franchise provisions complained of are those requiring the street car company, the petitioner, to pave between its tracks and one foot on either side, to contribute to the cost of bridges, to pay a certain percentage of its gross earnings to the city, and to

permit certain officers or employees of the city free transportation. The franchises containing these provisions were all granted prior to the passage of the public service commission law.

The first question is whether the public service commission is authorized by the statute to relieve from the franchise provisions complained of when the income of the company is not sufficient to pay a reasonable return upon the value of the property devoted to the public service and provide an adequate and sufficient service. In 1890, the legislature passed what is commonly called the enabling act, relating to cities. Section 5, subd. 9, of this act (Laws 1890, p. 218), Rem. Code, § 7507, contains the following grant of power:

“To authorize or prohibit the locating and constructing of any railroad or street railroad in any street, alley, or public place in such city, and to prescribe the terms and conditions upon which any such railroad or street railroad shall be located or constructed; . . .”

In pursuance of the authority granted by this section, the city of Tacoma granted franchises and placed the conditions therein above referred to. With these conditions, the franchises were accepted.

As we understand the argument, it is not claimed that these franchise provisions are illegal or void, or that the city did not have the power to impose such conditions when it granted the franchises. It is claimed, however, that, this being a matter within the police power, the state had a right, in the exercise of that power by a subsequent statute, to confer upon the public service commission the right to abrogate franchise provisions, and did, in fact, in the public service commission law, confer that power upon the public service commission. It will be noted that the section of the statute quoted expressly empowers cities of the first class to regulate and control the use of its streets and

to authorize or prohibit the use of its streets, and to prescribe the "terms and conditions upon which any such railroad or street railroad shall be located or constructed." Here is a clear and specific grant by the state to the city to impose terms and conditions upon which any of its streets may be used by a street railroad. In *Tacoma R. & Power Co. v Tacoma*, 79 Wash. 508, 140 Pac. 565, it was held that, by this statute, the legislature intended to, and did, vest the city with the whole of the state's police power touching the subject-matter, the subject-matter being the right to impose terms and conditions upon a railroad or street railroad as a condition precedent to the location or construction of any such railroad or street railroad upon a city street or streets. It was there said:

"The statute quoted, Rem. & Bal. Code, § 7507, subd. 7, expressly empowers cities of the first class to regulate and control the use of streets, and to 'authorize or prohibit' the use of electricity at, in, or upon any of the streets, 'and to prescribe the terms and conditions upon which the same may be used, and to regulate the use thereof.' Broader language could hardly be used. It is obvious that the legislature intended to, and did, vest the city with the whole of the state's police power touching the subject-matter." [Citing authorities.]

To the same effect, see *State ex rel. Tacoma v. Sunset Tel. & Tel. Co.*, 86 Wash. 309, 150 Pac. 427, L. R. A. 1917F 1178.

In *Cleveland v. Cleveland City R. Co.*, 194 U. S. 517, the court had occasion to construe a section of the revised statutes of the state of Ohio which authorized cities "to fix the terms and conditions upon which such railways may be constructed, operated, extended and consolidated," and it was there held that this statute was an express authorization to the city to impose conditions when granting a franchise.

The question then arises whether the public service commission law, either by its terms or by necessary implication, attempted to confer power upon the public service commission to modify or abrogate franchise provisions which had previously been imposed by the city when granting the franchises under the express authorization of the legislature. Section 53 of the public service commission law, page 571, ch. 117, Laws of 1911, is as follows:

“Whenever the commission shall find, after a hearing had upon its own motion or upon complaint, as herein provided, that the rates, fares or charges demanded, exacted, charged or collected by any common carrier for the transportation of persons or property within the state or in connection therewith, or that the regulations or practices of such common carrier affecting such rates are unjust, unreasonable, unjustly discriminatory, or unduly preferential, or in any wise in violation of the provisions of law, or that such rates, fares or charges are insufficient to yield a reasonable compensation for the service rendered, the commission shall determine the just, reasonable or sufficient rates, fares or charges, regulations or practices to be thereafter observed and enforced and shall fix the same by order as hereinafter provided.

“Whenever the commission shall find, after such hearing, that the rules, regulations, practices, equipment, appliances, facilities or service of any such common carrier in respect to the transportation of persons or property are unjust, unreasonable, unsafe, improper, inadequate or insufficient, the commission shall determine the just, reasonable, safe, adequate sufficient and proper rules, regulations, practices, equipment, appliances, facilities or service to be observed, furnished, constructed or enforced and be used in the transportation of persons and property by such common carrier, and fix the same by its order or rule as hereinafter provided.” Rem. Code, § 8626-53.

If the law confers power upon the commission to modify or abrogate franchise provisions, it must be

found in this section. A critical examination of the language used will disclose that there is there conferred upon the commission the power to deal with the questions of safety, efficiency, rates and quality of service. In other words, speaking generally, the statute confers upon the commission power to deal with the subject of rates and service. There is nothing in this section which either expressly or by necessary implication confers power upon the public service commission to deal with the question of franchises or to modify any of the terms or conditions that may have previously been imposed therein. The law will be searched in vain for any provision which confers such power upon the commission. The right to deal with the question of rates and service is an entirely different matter from the right to grant franchises or abrogate the provisions thereof. The franchises in question having been granted under the clear and express authority of the statute enacted long prior to the public service commission law, it seems plain that it was not the intent of the latter law to grant power to the commission to abrogate franchise provisions. Had the legislature desired to confer this power upon the commission it would have been easy to have said so in such language as would have made the intent plain. The history of the legislation, however, is such as to indicate an affirmative intention on the part of the legislature not to confer such power upon the public service commission.

The first bill introduced in the legislature in 1911 for the purpose of extending the scope of the previous railroad commission law was Senate Bill No. 102. This contained a provision which conferred upon the commission:

“Power and authority to grant, modify, revoke, and generally regulate the terms and provisions of such permit, license or franchise. . . .”

Neither this provision nor any similar provision appears in the law which was enacted by the legislature and which is known as the public service commission law above referred to. Had the legislature intended that the commission should have power to deal with franchises in cities or abrogate provisions of franchises which had previously been amended by the cities, there certainly would have been embodied in the law as passed some provision relating to that subject-matter. As already stated, the subject-matter of granting franchises and imposing conditions therein and the subject-matter of rates and service are entirely different. Whether the legislature has the power to confer upon the public service commission the right to abrogate the conditions in franchises to street railroad companies which had been granted prior to the passage of the public service commission law is a question not before us at this time, and we neither express nor intimate any opinion thereon.

The other question to be determined upon this application is: Does the public service commission have the power to increase the fare which the petitioner may charge within the city limits of Tacoma to more than five cents, since, as found by the commission, the income of the petitioner is not sufficient to pay a reasonable return upon the value of the property devoted to the public service and provide an adequate and sufficient service? This question, like the one previously considered, involves a consideration of the power conferred upon the commission by the public service commission law. In the Laws of 1905, ch. 81, p. 145, the legislature passed what was known as the railroad commission act. This law applied to railroads and express companies. It did not include street railroad companies. In 1907, the legislature passed an act (ch. 226, Laws of 1907, p. 536) amending the previ-

ous act relating to railroads and express companies. By this amended act, street railroad companies were not included within its provisions. In 1911, the legislature passed what is known as the public service commission law (ch. 117, Laws of 1911, p. 538; Rem. Code, § 8626-1 *et seq.*). This law was much more comprehensive than the previous statute, and brought within its provisions public utilities which had not been included within the earlier enactments, among them, street railroad companies. Section 9 (p. 546, Id., § 8626-9) of this later act provides, among other things, that all charges for any service rendered in the transportation of persons or property by any common carrier "shall be just, fair, reasonable and sufficient," and also that every common carrier shall construct, furnish, maintain and provide safe, "adequate and sufficient service" to enable it to expeditiously and safely transport all persons offered or received by it for transportation. Section 25 (p. 558) of the act is as follows:

"No street railroad company shall charge, demand or collect more than five cents for one continuous ride within the corporate limits of any city or town. . . ." Rem. Code, § 8626-25.

As already pointed out, § 53, above quoted, is the one which confers power upon the commission to regulate service and rates.

Section 112 (p. 612, Id., § 8626-112), which is the last section of the act, provides that, in so far as it embraces the same subject-matter, the act shall be construed as a continuation of chapter 81 of the Laws of 1905 (the railroad commission law) and the acts amendatory thereof and supplemental thereto.

The petitioner contends that, since its income is not sufficient to pay a reasonable return upon the value of the property used in the public service and furnish

an adequate and sufficient service, the commission has the power under § 53 to increase the rate to more than five cents, even though that limitation is provided in § 25 of the statute itself, a portion of which is above quoted. It is a familiar canon of construction that the different sections or provisions of the same statute should be so construed as to harmonize and give effect to each; but if there is an irreconcilable conflict, the subsequent one prevails. The argument here is that there is an irreconcilable conflict between § 25, which limits the fare to five cents, and § 53, which confers upon the commission power to deal with the question of rates and service. If § 53 abrogates § 25 of the same act it must be by implication only, as it is not expressly so done. It is also a well-settled rule of construction that repeals by implication are not favored. It is true, by § 9 of the act, there is imposed upon the carrier the duty to provide adequate and sufficient service. The various sections referred to should be harmonized, if possible, rather than holding that one section of the act was intended to repeal by implication a prior section. It is a matter of common knowledge that, at least up to the time this statute was passed, the economic judgment of society was that the maximum fare to be charged by a street railroad company for one continuous ride within the corporate limits of a city was five cents. It is also a fact generally known, but possibly one of which the court would not be justified in taking judicial knowledge, that most all street railroad franchises contain such a limitation.

When the act of 1911 was passed, as already stated, street railroad companies had not been subject to regulation by the laws passed prior to that time. That act extended the previous railroad commission act to include street railroad companies and other public utilities, and at the same time embodied in § 25 an express

mandate of the legislature that no street railroad company should charge, demand or collect more than five cents for one continuous ride within the corporate limits of any city or town. It was evidently not the thought of the legislature that, by § 53, there was conferred upon the public service commission power to abrogate this express declaration. The commission undoubtedly has the power to regulate rates, so long as it does not exceed the limit of five cents, and to require an adequate and sufficient service within this limitation, having due regard to the right of the company to earn a reasonable return upon the value of the property devoted to the public use. Giving the statute such a construction harmonizes its various provisions and, as we think, declares the plain intent of the legislature.

The case of *State ex rel. Great Northern R. Co. v. Railroad Commission*, 52 Wash. 33, 100 Pac. 184, does not authorize or direct a different conclusion. In that case it was held that the maximum rate acts passed by the legislatures of 1893 and 1897 were repealed by necessary implication by the subsequent railroad commission act passed in 1905 and the amendatory act of 1907. There the court was evidently of the opinion that the later act superseded all prior acts on the matter in hand and comprised the sole system of legislation on the subject of rates. But the situation as it appeared in that case is not the same as in the present case. Here, as has been pointed out, when the street railroads were first made subject to the jurisdiction of the public service commission, there was an express provision in the same act which provided that no street railroad company should charge more than five cents. It cannot, therefore, be held that it was the intention of the legislature, by continuing in § 53 substantially the same provisions that had been embodied in the prior law

relating to railroad and express companies and making such provisions applicable to all public utilities brought within the provisions of the law, to thereby grant to the public service commission the right to fix a rate in excess of five cents and disregard the provision in § 25 limiting the rate to that sum. The Missouri cases—*State ex rel. Missouri Southern R. Co. v. Public Service Commission*, 259 Mo. 704, 168 S. W. 1156; and *State ex rel. Rhodes v. Public Service Commission*, 270 Mo. 547, 194 S. W. 287—are, in their facts, substantially like the case of *State ex rel. Great Northern R. Co. v. Railroad Commission*, *supra*.

The case of *People ex rel. Ulster & D. R. Co. v. Public Service Commission*, 156 N. Y. Supp. 1065; *Id.*, 112 N. E. 1071, is also distinguishable. In the state of New York there was what was known as the railroad law, and also the public service commission law. These were each revised and amended by the legislature in 1910, the railroad law declaring that the power of railroad corporations was subject to the limitations and requirements of the public service commission law. The section of the law relating to the question of rates of fare was also made subject to the provisions of the public service commission law. While the court in that case considered the railroad law and the public service commission law as one, and held that the public service commission was not bound by the maximum rates fixed in the railroad law, the provisions referred to in the railroad law making it subject to the provisions of the public service commission law do not make the case applicable to the facts here presented. Had the legislature of this state intended that the public service commission might authorize the charge by a street railroad company of a greater fare than five cents it would have been easy, when fixing the five-cent maximum, as it appears in § 25, to have added the provision

that a greater rate might be charged when authorized by the commission upon a proper showing of the necessity therefor. This is substantially what the New York statute does.

It is there expressly provided, in § 53 of the amendatory act of 1911, that, whenever the commission shall be of the opinion that the maximum rates collected or charged are insufficient to yield reasonable compensation for the service rendered and are unjust and unreasonable, the commission shall determine and prescribe the reasonable and just rates to be thereafter observed and enforced as the maximum to be charged.

It is doubtless true that the public service commission law is remedial legislation and should be given a liberal construction for the purpose of carrying out the will of the legislature, as was pointed out in *State ex rel. Railroad Commission v. Great Northern R. Co.*, 68 Wash. 257, 123 Pac. 8, but the rule authorizing a liberal construction does not mean that the court shall write conditions or provisos into the statute where the legislature has placed none, or write out of the act a section which the legislature has placed there, when the various sections of the statute are not in irreconcilable conflict and may be harmonized. If, as found by the commission, the revenue of the petitioner based upon a five-cent fare is not sufficient to provide an adequate and sufficient service and at the same time afford a reasonable and proper income to the petitioner, the remedy is with the legislative branch of the government and not with the court. It is the duty of the court to construe the law as it finds it.

The writ will be denied.

ELLIS, C. J., MOUNT, PARKER, FULLERTON, HOLCOMB, WEBSTER, and CHADWICK, JJ., concur.

[No. 13401. Department One. April 29, 1918.]

JUDSON P. WILSON, *as Executor etc., Appellant*, v.
ORVIS B. JOSEPH *et al., Respondents*.¹

GIFTS—CAUSA MORTIS—DELIVERY—EVIDENCE—SUFFICIENCY. The evidence warrants the finding that a diamond ring and a diamond brooch were delivered to the defendants as gifts by the deceased at the time of her last sickness, where it appears without dispute that she had great affection for the defendants, and several times expressed the intention to make the gifts, and on a previous occasion on submitting to an operation actually made the delivery, but they were later returned, and while at the hospital on the last occasion, the defendants came to her upon a telephone request, and received possession of the jewelry in the presence of the deceased.

Appeal from a judgment of the superior court for King county, Smith, J., entered December 2, 1915, upon findings in favor of the defendants, in an action by an executor to recover property alleged to belong to the estate of a decedent, tried to the court. Affirmed.

Vince H. Faben, for appellant.

Ryan & Desmond, for respondents.

PARKER, J.—Judson P. Wilson, as executor of the estate of Mary H. Wilson, his deceased wife, claims, as belonging to her estate, and seeks recovery of, jewelry consisting of a diamond ring and a diamond brooch, from Orvis B. Joseph and Nettie M. Joseph, his wife, which jewelry is in their possession and claimed by them as a gift from Mrs. Wilson made by her to them a short time prior to her death. The issues were raised by petition filed in the superior court for King county by Wilson in the probate proceedings, and by the answer thereto of Joseph and wife. Trial upon the merits was had upon the issues so raised, as though it were an independent action, and resulted in findings

¹Reported in 172 Pac. 745.

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and judgment in favor of Joseph and wife, adjudging them to be the owners of the jewelry, from which the plaintiff has appealed to this court.

The jewelry in question is of the value of approximately \$1,000. The jewelry was Mrs. Wilson's separate property. She possessed a considerable amount of property of which this jewelry was a comparatively small portion. For many years prior to her death, Joseph was a very intimate friend of Mrs. Wilson. He had lived in the Wilson family as a boy, and, while not a blood relative, Mrs. Wilson had such regard and affection for him that she often referred to and addressed him as her son; and after his marriage, which occurred a few years prior to her death, she also had great regard and affection for his wife. This was evidenced by remarks to her friends, of which the following is one, "I think as much of Nettie and Orvis as if they were my own." About a year prior to her death, she said to Joseph, "Son, I want you to remember that when I die this ring is yours and this pin is Nettie's." This was said relative to this jewelry, in the presence of a witness who testified to that fact and who has no pecuniary interest in the outcome of this controversy. This fact is not disputed by any other witness. Mrs. Wilson had, on one occasion when she went to a hospital for treatment, evidently fearing that she might not recover, actually placed this jewelry in the possession of Joseph and his wife, intending it should be theirs in case she did not recover. It was, however, returned to her upon her recovery from that treatment. Thereafter and about four months prior to her death, as Joseph testified, Mr. Wilson said to him, "I understand that mother is going to will her diamonds to you and Nettie." On July 19, 1915, Mrs. Wilson went to a hospital for treatment, and on the following day, in response to a telephone call from the hospital (at whose

instance it does not appear), Joseph and wife called upon her there, when they received possession of the ring and brooch in her presence, which have been in their possession ever since. Apparently no one else was then present.

The trial court refused to hear testimony from either Joseph or Nettie as to what Mrs. Wilson then said, evidently having in mind the statutory prohibition against a party testifying "in his own behalf as to any transaction had by him with or any statement made to him by any such deceased person." Rem. Code, § 1211. So that, as to what occurred there, we have the positive evidence only of the fact that Joseph and his wife then acquired possession of the jewelry in Mrs. Wilson's presence. We think there is enough in the record to warrant the conclusion that Mrs. Wilson then believed that her recovery from her sickness was unlikely. She died without having left the hospital, on August 27, 1915.

It is contended on appellant's behalf that the facts proven do not in law support a gift of the jewelry by Mrs. Wilson to Joseph and wife as claimed by them. We cannot agree with this contention. That there was an actual delivery of the jewelry to Joseph and wife by Mrs. Wilson at the time they obtained possession of it on July 20, 1915, and that she then delivered it to them with the intent to give it to them, we think is a conclusion well supported by the evidence, though we have no direct evidence of what she actually said or did at that time. Her regard and affection for Joseph and his wife, and her previously clearly evidenced intentions, there being not the least suspicion cast upon Joseph and his wife suggesting wrong on their part in acquiring possession of the jewelry, we think calls for the conclusion that they received it at the hands of Mrs. Wilson, on July 20, 1915, as a gift from her.

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We think no decision rendered by this court is out of harmony with this conclusion, and that the views expressed in the following of our decisions support it: *Phinney v. State ex rel. Stratton*, 36 Wash. 236, 78 Pac. 927, 68 L. R. A. 119; *Davie v. Davie*, 47 Wash. 231, 91 Pac. 950; *MacKenzie v. Steeves*, 98 Wash. 17, 167 Pac. 50.

It is further contended that Mrs. Wilson was mentally incompetent to make such a gift on July 20, 1915. The evidence is quite voluminous on this question. We have examined it with care as presented in the abstracts prepared by counsel, and are quite convinced that the trial court correctly held that she was then mentally competent. We think it would be unprofitable to review the evidence in detail in this opinion.

The judgment is affirmed.

ELLIS, C. J., WEBSTER, MAIN, and FULLERTON, JJ.,
concur.

[No. 14093. *En Banc*. April 29, 1918.]

W. W. KEYES, *Trustee, Appellant*, v. R. L. SABIN *et al.*,
Respondents.¹

ASSIGNMENTS FOR BENEFIT OF CREDITORS—PRIORITIES—UNRECORDED CHATTEL MORTGAGE. An assignee for the benefit of creditors under a consummated assignment, who acquired possession of the property without knowledge of an unrecorded chattel mortgage, can assert priority over the mortgage the same as the creditors could have done under assignment directly to them.

SAME—TITLE ACQUIRED. A consummated assignment for the benefit of creditors under which the assignee takes possession prior to the recording of a prior mortgage creates more than a lien in favor of general creditors, who acquire ownership and at least equitable title.

CHATTEL MORTGAGES—VALIDITY—STOCK IN TRADE—SALES AND PROCEEDS—RIGHTS OF CREDITORS. A chattel mortgage on a general stock of merchandise is void as to creditors of the mortgagors, where the stock was left in possession of the mortgagors with power to sell in the usual course of trade without any agreement to apply any part of the proceeds to the satisfaction of the mortgage debt.

SAME—FAILURE TO RECORD. A chattel mortgage is void as to creditors of the mortgagors where it was not recorded within ten days after its execution, nor until after an assignment for the benefit of creditors had been made and the assignee had taken possession; since the assignment created a specific lien for the benefit of creditors; Rem. Code, §§ 3670, 3660, requiring recording within ten days after execution as against creditors and subsequent purchasers or incumbrancers in good faith.

Appeal from a judgment of the superior court for Cowlitz county, Darch, J., entered December 21, 1916, upon findings in favor of the defendants, in an action to establish the lien of a chattel mortgage as a prior claim against an insolvent estate, tried to the court. Affirmed.

W. W. Keyes, for appellant.

Teiser & Smith, for respondents.

¹Reported in 172 Pac. 835.

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Opinion Per FULLERTON, J.

FULLERTON, J.—On March 4, 1915, W. A. Williams and B. I. Williams, doing business as W. A. Williams & Company, were conducting a general merchandise store at Castle Rock, in this state. Being then indebted to the Sperry Flour Company and the Puget Sound Flouring Mills Company, who through their agent were pressing for payment, they executed to the appellant Keyes, as trustee for the use of the creditors named, some eight promissory notes, aggregating the amount of the indebtedness, and attempted to secure the notes by a chattel mortgage covering their stock of merchandise. The notes divided the indebtedness into substantially equal payments, the first becoming due on April 4, 1915, and the remainder in order monthly thereafter, the last falling due on November 4, 1915. The mortgage was in form that commonly used in this state for mortgaging specific chattels. It covenanted that, if the sum of money represented by the notes be paid according to the tenor and effect of the notes, the mortgage should be void, but that, "if default be made in the payment of said sum of money or the interest thereon or any part thereof at the time the same shall become due, or any attempt shall be made to remove any of said property from said county or to dispose of the same without the written consent of" the mortgagee, then the entire indebtedness should become due and payable and the mortgage subject to foreclosure. There was an understanding between the mortgagees and the mortgagor, shown by the testimony of the agent taking the mortgage, that the mortgagors should remain in possession of the property and continue their business as they did prior to its execution. The court found, however, that there was no agreement, either in writing or by parol, that any part of the proceeds arising from the conduct of the business should be re-

tained by the mortgagees for application upon the mortgage debt.

The mortgage was not recorded until March 27, 1915. Between the date of its execution and the date of the recording, namely, March 20, 1915, the mortgagors made a common law assignment of their property to the respondent Sabin for the benefit of their creditors, the assignment including the stock of goods covered by the mortgage. Immediate possession of the property was taken by the assignee, and he was in such possession when the mortgage was recorded. It was found that the assignee had no notice of the mortgage at the time the assignment was made, and while there is no finding on the question, it was not shown that any of the creditors of the assignors other than the beneficiaries of the mortgage had such notice.

The mortgagee did not attempt to disturb the assignee in his possession of the property, but filed his claim with the assignee as a creditor, claiming a preference over other creditors to the extent of his mortgage. The assignee continued in possession of the property until he finally disposed of it and reduced its value to cash. He, however, refused to recognize the mortgagee's claim as a preference claim, whereupon the present action was begun to establish it as such. The trial court held the mortgage void as to the general creditors of the mortgagors; held, also, that the assignee could assert its invalidity as the representative of the creditors, and denied the claim of preference. From a judgment entered in accordance with such holdings, this appeal is prosecuted.

Taking up the assignments of error in a somewhat different order from that in which they are presented in the brief of the appellant, the first and principal contention is that the assignee is not in a position to assert the invalidity of the mortgage. It is argued that the

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assignee takes only such title as the assignor had, and as the mortgage was good as between the mortgagors and the mortgagee, it is good as between the assignee and the mortgagee. But we cannot think the relation here assumed correctly represents the assignee's position. It is true, unquestionably, that if there was a valid and subsisting lien on the property assigned, good as against all the world, or if the title to any of the property was defective in the assignors, the assignee would take the property subject to such lien or defect. But it does not follow that he takes the property subject to all inchoate or imperfect liens, invalid as to certain persons although valid as between the parties thereto. The assignee holds the property in trust for certain designated persons; in this instance, the creditors of the assignors. In his individual right he acquired nothing by the assignment. He is but the mediary through whom the title to the assigned property was conveyed to creditors. If, therefore, these creditors, the actual beneficiaries of the assignment, could have acquired a valid title against any inchoate or imperfect lien upon the property by an assignment made directly to them, they can acquire such a right by an assignment made to another for their benefit. It cannot be doubted, we think, that, if the assignment had been made directly to the creditors, and the mortgage the appellant seeks to assert is invalid as against them, they could assert its invalidity in any suit against them brought to enforce the mortgage. If they could do this in their individual capacities, there is no reason why they cannot do it through their representative.

It will be remembered that this is a consummated assignment. Not only was there an assignment of the property, but it was taken possession of by the assignee and is still held by him although in a substituted form. Had the mortgagee obtained possession of the

mortgaged property prior to the assignment under a defectively executed mortgage, or possession after the assignment but prior to the time it was reduced to possession by the assignee, it may be that the assignee could not have recovered it. But the rule that denies recovery in such instances does not rest on the ground that the assignee is not the representative of the creditors in such a way as to assert such rights as are vested in them, but rests on the ground that the creditors themselves, in such cases, could not assert the right.

While it may not argue very strongly in favor of the conclusion we have reached, it is well to remember, further, that the appellant is himself here suing in a representative capacity. He has, individually, no interest in the mortgage he seeks to enforce, nor in the debt thereby attempted to be secured. He sues in the capacity of a trustee, and all the rights he is attempting to assert are rights which inhere in his *cestuis que trustent*. If he may, in a representative capacity, assert for them the validity of the mortgage, seemingly the assignee may, in the same capacity, assert for others its invalidity.

The question presented is not altogether new in this state. In *Moore v. Terry*, 17 Wash. 185, 49 Pac. 234, it appears that the copartnership of Dodge & Smith, then operating a hotel, gave a chattel mortgage upon the hotel furniture to secure an indebtedness owing to one Terry, the mortgage containing a provision that it should cover all furniture that should thereafter be put into the hotel by the copartnership. Dodge later succeeded to the rights of Smith and operated the hotel on his own behalf. While so operating it, he put furniture therein belonging to himself individually. Later he became insolvent and made an assignment for the benefit of his creditors. The mortgagee made claim to furniture put into the hotel by Dodge, which claim

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the assignee resisted. The trial court held in favor of the assignee, and on the appeal it was contended that the mortgage was valid as to the after-acquired property as between the mortgagee and Dodge, and was, therefore, valid as between the mortgagee and the assignee, since the assignee could acquire no greater rights in the property than Dodge had to assign. Answering the contention, the court used this language:

"The appellants contend that the assignee could have no greater rights than Dodge himself had in the premises, and that if a lien could be maintained as against Dodge, it must be held good in this instance; and authorities are cited upon the proposition that an assignee can have no greater rights than the insolvent had. But, under the holdings of this court, such a rule does not obtain here, for the assignee represented the creditors as well as the insolvent, and could assert such rights as the respective creditors could have asserted in case of a direct action. *Mansfield v. National Bank*, 5 Wash. 665, 32 Pac. 789, 999."

A similar principle was announced in the case of *Benner v. Scandinavian American Bank*, 73 Wash. 488, 131 Pac. 1149, Ann. Cas. 1914D 702. That was a case in which Benner, a trustee in bankruptcy, sought to recover from the bank certain property transferred by the bankrupt to the bank in violation of the bankruptcy act. Among other contentions, the bank urged that the trustee had no such interest as enabled him to maintain the action. Stating the contentions and the governing rule, this language was used:

"But it is said that the creditors here are not seeking to sequester the property to the satisfaction of their debts; that the title to the property is in the trustee in bankruptcy, who took it from the bankrupt, the vendor in the bill of sale; that the trustee's title is no better than the bankrupt's, and since it could not avoid the conveyance, the trustee cannot. But the trustee not only holds the legal title to the bankrupt's estate, but

he represents the creditors of the bankrupt also. Such rights as they possessed against the claimants and holders of the bankrupt's estate, he possesses; and he can avoid any transfer or conveyance of the property which they could have avoided. In other words, the bankruptcy proceedings are in themselves in effect an attachment and sequestration of the property of the bankrupt for the benefit of his creditors, and the trustee thereof has plenary power to take all such steps as are necessary to subject the bankrupt's property to the satisfaction of his obligations. Bankruptcy Act, § 67, c; *Mueller v. Nugent*, 184 U. S. 1; *Bank v. Sherman*, 101 U. S. 403; *Bryan v. Bernheimer*, 181 U. S. 188; *In re Pekin Plow Co.*, 112 Fed. 308; *In re Thorp*, 130 Fed. 371."

The appellant cites and relies upon the cases of *Malmo v. Washington Rendering & Fertilizing Co.*, 79 Wash. 534, 140 Pac. 569, L. R. A. 1917C 440, *Eilers Music House v. Ritner*, 88 Wash. 218, 152 Pac. 1008, 154 Pac. 787, and *Sunel v. Riggs*, 93 Wash. 314, 160 Pac. 950. In the first and second of these cases it was held that a conditional sales contract good as between the parties was good as to general creditors, that is, creditors who had not acquired a specific lien upon the property; and that the appointment of a receiver of the property of the debtor at the suit of the creditors was not such a sequestration of the debtor's property as to create such specific lien. The rule of these cases is seemingly contrary to the earlier cases of *Willamette Casket Co. v. Cross Undertaking Co.*, 12 Wash. 190, 40 Pac. 729, and *Manhattan Trust Co. v. Seattle Coal & Iron Co.*, 16 Wash. 499, 48 Pac. 333, 737, in the first of which it was pointed out that the appointment of a receiver placed the general creditors at a disadvantage, if it were to be held that the receiver was not so far their representative as to be able to question in their behalf liens void as to them, since the very appointment of the receiver placed it beyond their power to

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acquire a specific lien. Indeed, the court went so far as to say that it did not think it would be seriously questioned that a mortgage inoperative as to creditors would not be operative as to the receiver as their representative. But giving effect to the rule of the later cases, we think they are distinguishable from the present case and the cases we have cited as supporting the present case. Here the general creditors acquired more than a lien by the assignment. They acquired ownership and title; equitable title it may be, but title nevertheless. Having title through their representative, it is unsound in principle to say that they cannot question liens void as to them, and what is the same thing, question such liens through their representative. The fact that no immediate consideration passed from the assignee to the assignor, or the fact that the obligation which the assignment was intended to satisfy antedated the assignment, does not invalidate or subject the assignment to the lien of the mortgage. A purchaser of property in consideration of a preexisting debt is within the protection of the statutes. *Johnston v. Wood*, 19 Wash. 441, 53 Pac. 707.

The third case, while it is not questioned that it was rightly decided, we think was rested upon an untenable ground. The conditional sale in that case was perfected by recordation prior to the time the assignment was made, and was then valid under the authority of *Pacific Coast Biscuit Co. v. Perry*, 77 Wash. 352, 137 Pac. 483, since the creditors had not at that time acquired either title to the property or a specific lien thereon. But the majority of the court think it wrong to the extent that it was rested upon the ground that the assignee was not so far the representative of the creditors as to be able to question a conditional sales contract void as to general creditors.

It is worthy of mention, also, that the decisions in

these cases did not meet with general approval. The legislature of the state, since the decisions were announced (Laws of 1915, pp. 276, 277; Rem. Code, §§ 3670, 3660), has enacted statutes declaring all chattel mortgages and contracts of conditional sale void as to creditors, "whether or not they have or claim a lien upon such property," unless executed and recorded in a prescribed manner.

Our conclusion, therefore, is that the assignee can question the validity of the chattel mortgage in issue, as the representative of the general creditors of the assignors.

The further inquiry is, was the mortgage void as to creditors. The trial court held that it was, for two reasons: (1) it covered a general stock of merchandise of which the mortgagors were left in possession with power of disposition and sale in the usual course of trade, without any agreement, either oral or written, to apply the proceeds, or any part of the proceeds, derived from such disposition or sale to the satisfaction of the mortgage debt; and (2) the mortgage was not recorded within ten days after its execution, nor until after the assignment for the benefit of creditors had been made and the assigned property had been taken possession of by the assignee.

Our conclusion on the second of these propositions renders it unnecessary to discuss the first. It may be remarked in passing, however, that such mortgages were held void *per se* as to creditors by the territorial court in the cases of *Wineburgh v. Schaer*, 2 Wash. Terr. 328, 5 Pac. 299, and *Byrd v. Forbes*, 3 Wash. Terr. 318, 13 Pac. 715, and no case from the state court has been pointed out to us where a contrary doctrine has been announced. We have held such mortgages valid when accompanied by an agreement, either parol or written, that the proceeds derived from the conduct

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of the business shall be applied to the satisfaction of the mortgage debt, or to the running expenses, the keeping up of the stock, and the satisfaction of the debt, and have held a mortgage valid where the agreement was that the mortgaged stock should not be reduced below a fixed value; but no case, as we say, holds that a mortgage is valid where the mortgagor is permitted to remain in possession of the property and dispose of it by sale in due course of trade with no obligation to account for such sales prior to the maturity of the mortgage debt. For the convenience of the curious, we cite the cases where the question has been touched upon: *Warren v. His Creditors*, 3 Wash. 48, 28 Pac. 257; *Ephraim v. Kelleher*, 4 Wash. 243, 29 Pac. 985, 18 L. R. A. 604; *Benham v. Ham*, 5 Wash. 128, 31 Pac. 459, 34 Am. St. 851; *Sanders v. Main*, 12 Wash. 665, 42 Pac. 122; *Adams v. Dempsey*, 22 Wash. 284, 60 Pac. 649, 79 Am. St. 933; *Van Winkle v. Mitchum*, 66 Wash. 296, 119 Pac. 748; *Nason & Co. v. Stack*, 81 Wash. 147, 142 Pac. 477.

We are clear that the mortgage is void for the second reason stated. The statute in force at the time the mortgage was executed (Rem. & Bal. Code, § 3660), provides that a mortgage of personal property is void as against creditors of the mortgagor, or subsequent purchasers and incumbrancers of the property for value and in good faith, unless it is accompanied by the affidavit of the mortgagor that it is made in good faith, and without any design to hinder, delay, or defraud creditors, and is acknowledged and recorded in the same manner as is required by law in conveyances of real property. A subsequent statute (Rem. Code, § 3661) permits its recordation within ten days from the time of its execution, making the recording within that period a compliance with the requirement in the first section cited. By a reference to the statement of the case

we have made, it will be seen that the mortgage was not recorded within the time limited by the statute, nor until after the property had been assigned to the respondent and he had taken possession of the property. By the terms of the statute as construed by our decisions, the mortgage was void as to all creditors who are in a position to assert the invalidity of the mortgage by acquiring a specific lien upon the property. And since we hold that the assignment of the property for their benefit created such a lien, it follows as of course that the mortgage is void as to them. It would seem that the words of the statute were so clear as to scarcely admit of dispute or contrary opinion, but it has nevertheless been, as to its meaning, the subject of controversy before this court. In *Hinchman v. Point Defiance R. Co.*, 14 Wash. 349, 44 Pac. 867, one of the questions in contest was the priority of a subsequent properly executed mortgage over a defectively executed prior one good as between the parties. The court, after quoting the statute, used this language:

“Manifestly, there are three classes of persons whose rights are defined by this section. They are, (1) creditors of the mortgagor; (2) subsequent purchasers, and (3) parties in whose favor subsequent incumbrances of the property are made. As to the first class—creditors—the unrecorded mortgage is absolutely void. It is void, also, as to the two latter classes when they deal with the mortgaged property for value and in good faith.”

In *Manhattan Trust Co. v. Seattle Coal & Iron Co.*, 16 Wash. 499, 48 Pac. 333, 734, the question was as to the validity of a mortgage upon personal property executed and recorded in the form of a mortgage upon real property. The court held the mortgage void as to creditors because not executed in manner prescribed by the statute nor recorded so as to give constructive

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notice. In the course of the opinion, this language was used:

“There was no affidavit of the mortgagor that any mortgage of personal property was made in good faith and without any design to hinder, delay and defraud creditors, and it was not recorded as a chattel mortgage. Section 1648, Gen. Stat. (1 Hill’s Code), is as follows:

“‘A mortgage of personal property is void as against creditors of the mortgagor or subsequent purchasers, and incumbrancers of the property for value and in good faith, unless it is accompanied by the affidavit of the mortgagor that it is made in good faith, and without any design to hinder, delay or defraud creditors, and it is acknowledged and recorded in the same manner as is required by law in conveyance of real property.’

“Section 1649 provides:

“‘A mortgage of personal property must be recorded in the office of the county auditor of the county in which the mortgaged property is situated, in a book kept exclusively for that purpose.’

“The plain, literal meaning of these sections is against the contention of plaintiff that it has any lien whatever upon the personal property in the possession of the receiver as against these petitioners. There is no evidence whatever that the petitioners had any notice of the existence of any chattel mortgage in favor of the plaintiff. Counsel for plaintiff and receiver argued that, as petitioners, as creditors, have not negatived notice or knowledge on their part, it should be inferred against them; but this would be a novel rule and one that we have never seen applied. Such allegation and proof of notice should come from the one claiming the personal property under the alleged mortgage. But we are not prepared to decide that in any view there could be here a chattel mortgage as against these creditors.”

In the more recent case of *Smith v. Allen*, 78 Wash. 135, 138 Pac. 683, Ann. Cas. 1915D 300, it was held that a chattel mortgage without any certificate of acknowl-

edgment is void as against creditors or incumbrancers for value and in good faith, under the express provisions of this statute. It was held also that a creditor who takes a valid chattel mortgage to secure his antecedent debt is both a creditor and incumbrancer, and that his mortgage is superior to a prior defectively executed mortgage, notwithstanding he may have had knowledge of the prior mortgage.

But the inquiry need not be pursued. It is our conclusion that there is no error in the judgment sought to be reviewed. It will stand affirmed.

ELLIS, C. J., MOUNT, MAIN, HOLCOMB, PARKER, WEBSTER, and CHADWICK, JJ., concur.

[No. 14209. *En Banc*. April 29, 1918.]

THE STATE OF WASHINGTON, *Appellant*, v. POSTAL
TELEGRAPH-CABLE COMPANY, *Respondent*.¹

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—EXTRA HAZARDOUS EMPLOYMENTS—LEGISLATIVE DEFINITION. The legislature having, in Rem. Code, § 6604-3, of the industrial insurance act, defined the work of construction of telegraph and telephone plants as extra hazardous, the same is conclusive of the fact, especially since judicial notice cannot be taken to the contrary.

SAME. The legislature has the power to classify an occupation as extra hazardous unless the courts may take judicial notice that it is not hazardous.

PLEADING—DENIAL OF LEGISLATIVE DECLARATION. In an action to collect industrial insurance premiums, a denial that an occupation is extra hazardous is of no effect where it is a denial of the legislative declaration (Rem. Code, § 6604-3) that telegraph construction work is extra hazardous.

COMMERCE—WORKMEN'S COMPENSATION—INTERSTATE COMMERCE. Employees engaged in the original construction of telegraph lines are not engaged in interstate commerce, even though it be conceded that the telegraph company is engaged in interstate commerce.

¹Reported in 172 Pac. 902.

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MASTER AND SERVANT—WORKMEN'S COMPENSATION—EXACTION OF PREMIUMS—VALIDITY—"TAX." It does not follow from the fact that a telegraph company is an agent of the United States through its acceptance of the provisions of act of Congress, July 24, 1866 (U. S. Rev. Stat., §§ 5263-5269), and the building of post roads, that the industrial insurance provisions for the compensation of employees in the construction of the system within this state is either a tax upon or an attempt to regulate the business of the company; since it could not have been intended that such companies owed no obedience to state laws; and since the imposition is part of the cost of construction and not a tax upon the industry nor in the nature of a license tax.

CONSTITUTIONAL LAW—OBLIGATION OF CONTRACT—MASTER AND SERVANT—INDUSTRIAL INSURANCE. The industrial insurance act being valid as an exercise of the police power, it is not unconstitutional as impairing the obligation of preexisting contracts for the compensation of injured workmen.

MASTER AND SERVANT—WORKMEN'S COMPENSATION—INTERSTATE COMMERCE—TELEGRAPH OPERATORS—STATUTES. The industrial insurance act for the compensation of workmen injured in extra hazardous employments does not apply to employees engaged in operating the system and handling interstate messages of a telegraph company, where a large per cent of the business of the company is interstate business and it is impossible to segregate or separate the time of employees engaged in interstate from those engaged in intrastate business; in view of § 6604-18 of the act, providing that the act in such a case, applies only to such persons to the extent that their mutual connection with intrastate work is clearly separable and distinguishable from interstate or foreign commerce.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered November 25, 1916, in favor of the defendant, dismissing on the pleadings an action to recover premiums due under the provisions of the industrial insurance act. Reversed in part, and affirmed in part.

The Attorney General (John H. Dunbar, of counsel), for appellant.

O. L. Willett (W. W. Cook, of counsel), for respondent.

MOUNT, J.—This action was brought to recover premiums alleged to be due on the pay-roll of the workmen of the respondent company, under the provisions of ch. 74, Laws of 1911, p. 345 (Rem. Code, § 6604-1 *et seq.*), commonly known as the industrial insurance act.

The complaint alleged in substance, that the respondent was engaged in the business of constructing telegraph systems within the state during the years 1911 and 1912, and that premiums upon the pay-roll of the workmen employed by the respondent in such construction amounted to \$288.57; that respondent was also engaged in operating telegraph systems within the state, and that the premiums upon the pay-roll of workmen employed in such operation amounted to the sum of \$261.66; and that these amounts were payable under the provisions of the industrial insurance law. The appellant prayed for judgment in the sum of \$550.23. An answer was filed which denied that the respondent was engaged in hazardous or extra hazardous work. The answer set forth several affirmative defenses, which alleged, in substance:

First, that the respondent is doing both an intrastate and interstate business in receiving and transmitting messages, that it is impossible to segregate the time of its employees between local and interstate business, and that the claim of the state thereby results in an illegal burden and tax upon interstate commerce.

Second, that the respondent has accepted the provisions of the act of Congress of July 24, 1866 (U. S. Rev. Stat., §§ 5263-5269 [U. S. Comp. St. 1916, §§ 10072-10079], commonly known as the Post Roads act, and, pursuant thereto, has constructed and maintains lines of telegraph through and over portions of the public domain of the United States, over and along military and post roads of the United States, and over, under and across navigable streams and waters

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of the United States, and that, by reason of such acceptance, it is an agent of the United States.

Third, that the industrial insurance act, as applied to the respondent, is an unauthorized and unconstitutional interference with the power of Congress to establish post roads, to raise and support armies, etc.

Fourth, that the act violates the fourteenth amendment of the constitution of the United States, providing that no state shall deprive any person of life, liberty, or property, without due process of law, and that no state shall deny any person within its jurisdiction the equal protection of the laws.

Fifth, that the act violates the fifth amendment of the constitution of the United States, providing that private property shall not be taken for public use without just compensation.

Sixth, that the act violates § 3 of article 1 of the constitution of the state of Washington, providing that no person shall be deprived of property without due process of law.

Seventh, that the act violates § 16 of article 1 of the state constitution, providing that property shall not be taken for private use nor for public use without just compensation.

Eighth, that the respondent and many of its employees had made provision for benefits in case of disability, by an agreement entered into prior to the passage of the industrial insurance act, and that the act unnecessarily interferes with, and attempts to destroy, interests vested under such contractual arrangements.

After this answer was filed, the appellant moved for a judgment upon the pleadings. The respondent also moved for judgment upon the pleadings. The trial court, after hearing these motions, directed judgment for the respondent. Thereafter, the state filed a reply, denying some of the affirmative matters set forth in the

amended answer. The court then entered a judgment, dismissing the action. From this judgment of dismissal, the state has appealed.

From this statement of the case it will be noticed that the allegations of the complaint are all admitted, except the answer denies that the workmen employed by the respondent were engaged in hazardous or extra hazardous employment. It is admitted, therefore, as alleged in the complaint, that the respondent was engaged in constructing and operating telegraph lines within the state during the time alleged. It is admitted that the premiums due under the industrial insurance act were the amount stated in the complaint, namely, \$288.57 for employees engaged in construction work, and \$261.66 for employees engaged in the work of operating telegraph systems, in case these employments were extra hazardous.

The legislature, in the act mentioned, at page 346, § 2, Laws of 1911 (Rem. Code, § 6604-2), provides :

“There is a hazard in all employment, but certain employments have come to be, and to be recognized as being inherently constantly dangerous. This act is intended to apply to all such inherently hazardous works and occupations, and it is the purpose to embrace all of them, which are within the legislative jurisdiction of the state, in the following enumeration, and they are intended to be embraced within the term ‘extra hazardous’ wherever used in this act, to wit:”

Then, after naming a number of employments, the act designates: “engineering works; . . . telegraph . . . lines, . . .” And then, in the next section (Rem. Code, § 6604-3), engineering work is defined to mean: “any work of construction, . . . of . . . telegraph and telephone plants and lines; . . .”

So that the legislature has defined the work of constructing telegraph lines as “extra hazardous.”

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In the case of *State v. Powles & Co.*, 94 Wash. 416, 162 Pac. 569, we said, at page 420:

“The legislature, no doubt, has the power to determine directly, by its own enactment, what occupations are extra hazardous, as it has done by the specific enumeration in § 2 of the act.”

The legislature having defined the construction of telegraph lines as extra hazardous is conclusive of the fact, especially where judicial notice cannot be taken to the contrary. It seems certain we cannot take notice that the erection of telegraph poles and the stringing of wires thereon is not hazardous or extra hazardous. In view of the fact that the legislature has determined this class of work to be extra hazardous, it follows that an answer which admits the respondent has been engaged in constructing telegraph lines must necessarily admit that such work is extra hazardous, for respondent cannot be heard to dispute a legislative declaration.

In the case of *Mountain Timber Co. v. Washington*, 243 U. S. 219, Ann Cas. 1917D 42, the supreme court of the United States, in passing upon many constitutional questions therein raised, referred to the classification of extra hazardous occupations in this act and said, at page 242:

“We may conveniently answer at this point the objection that the act goes too far in classifying as hazardous large numbers of occupations that are not in their nature hazardous. It might be sufficient to say that this is no concern of plaintiff in error, since it is not contended that its businesses of logging timber, operating a logging railroad, and operating a sawmill with power-driven machinery, or either of them, are non-hazardous. *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 544. But further, the question whether any of the industries enumerated in § 4 are non-hazardous will be proved by experience, and the provi-

sions of the act themselves give sufficient assurance that if in any industry there be no accident, there will be no assessment, unless for expenses of administration."

The court, in that case, did not pass directly upon the question whether the occupations named in § 2 could be classified as extra hazardous by the legislature. We are of the opinion that, unless the courts may take notice of the fact that an occupation is not hazardous, it is within the power of the legislature to classify the same as hazardous. The construction of telegraph lines has been declared by the legislature of this state to be an extra hazardous occupation. We are of the opinion, therefore, that the denial of the respondent that it was engaged in an extra hazardous occupation is of no effect, because it is a denial of a legislative declaration. The trial court erred in granting the respondent a judgment upon the pleadings, unless some of the affirmative defenses are sufficient to defeat the action.

The first, second, and third affirmative defenses are to the effect that respondent, during the times mentioned in the complaint, was engaged in interstate commerce as an agent of the government, and that the tax here sought to be collected is an unlawful attempt to regulate interstate commerce by placing a burden upon the business, and that the intrastate business is not clearly separable from the interstate business.

Conceding for the present that the employees engaged in sending and receiving messages and in operating the telegraph system were engaged in interstate commerce, it is plain that the other class of employees engaged in construction work was not engaged in interstate commerce. These employees, according to the complaint, were engaged in original construction of lines of telegraph. The amount of premiums upon the

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pay-roll of workmen so employed was, according to the complaint, \$288.57.

In the case of *Raymond v. Chicago, M. & St. P. R. Co.*, 243 U. S. 43, where an employee was engaged in shortening the main line of a railway within this state and was injured by an explosion of a charge of dynamite while he was working in a tunnel, it was held that such employee was not engaged in interstate commerce at the time of his injury, and that he was relegated for relief to the workmen's compensation act, above referred to. The court there said, at page 45:

"And this result is controlling even although it be conceded that the railroad company was in a general sense engaged in interstate commerce, since it has been also this day decided that that fact does not prevent the operation of a state workmen's compensation act. *New York Central R. R. Co. v. White*, post, 188 [Ann. Cas. 1917D 629, L. R. A. 1917D 1.]"

For the same reason, it necessarily follows that, even though the telegraph company, the respondent here, is engaged in interstate commerce, its employees engaged in construction work come under the terms of the employers' liability act. *Killes v. Great Northern R. Co.*, 93 Wash. 416, 161 Pac. 69.

Conceding that the telegraph company is an agent of the United States, it does not follow that the provision made for injured employees in the construction of a telegraph system within this state is either a tax or an attempt to regulate the business of the telegraph company. As was said in *Western Union Tel. Co. v. Attorney General of Massachusetts*, 125 U. S. 530, at page 549:

"This authority of the government gives to this telegraph company, as well as to all others of a similar character who accept its provisions, the right to run their lines over the roads and bridges which have been declared to be post-roads of the United States. If the

principle now contended for be sound every railroad in the country should be exempt from taxation because they have all been declared to be post-roads; and the same reasoning would apply with equal force to every bridge and navigable stream throughout the land. And if they were not exempt from the burden of taxation simply because they were post-roads, they would be so relieved whenever a telegraph company chose to make use of one of these roads or bridges along or over which to run its lines."

And at page 548 of the same opinion, it was said:

"While the state could not interfere by any specific statute to prevent a corporation from placing its lines along these post-roads, or stop the use of them after they were placed there, nevertheless the company receiving the benefit of the laws of the state for the protection of its property and its rights is liable to be taxed upon its real or personal property as any other person would be. It never could have been intended by the Congress of the United States, in conferring upon a corporation of one state the authority to enter the territory of any other state and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the state into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support."

The same is true in this case. It never could have been the intention of Congress that a company constructing a telegraph line in this state owed no obedience to the laws of the state which it has entered. This industrial insurance law was enacted primarily for the purpose of protecting injured employees engaged in occupations declared to be hazardous. It is for the benefit of the employer as well as for the employees. The tax, if it may be called such, is a part of the cost of construction of the lines. It is not a tax upon the industry for the privilege of carrying it on, nor is it in the nature of a license tax.

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In so far as the construction of the line is concerned, the employees were clearly not engaged in interstate commerce, and the payment of the so-called tax does not affect the receipts from interstate commerce any more than the cost of construction affects such receipts.

It is further alleged that the employees of the respondent became members of the Postal Telegraph Employees' Association, and that there was a contract and agreement between the respondent and its employees by which the respondent agreed to pay its employees for any incapacity happening during the time of their employment, at a rate as set forth in the complaint; that the majority of the employees who worked during the years 1911 and 1912 entered the employment of the respondent before the passage of the workmen's compensation act; that the said act illegally interferes with the rights of the respondent and attempts to destroy vested interests under the contract. The answer to this contention is found in *State ex rel. Pratt v. Seattle*, 73 Wash. 396, 132 Pac. 45, where we said, at page 402:

"A more precise statement of the contention is that it violates the obligations of such contracts. But we cannot agree with this contention. The workmen's compensation act, under which these premiums are sought to be collected is a police regulation, and is a valid exercise of the police power of the state. *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466. 'All contracts are subject to this power, the exercise of which is neither abridged nor delayed by reason of existing contracts.' *Seattle v. Hurst*, 50 Wash. 424, 97 Pac. 454, 18 L. R. A. (N. S.) 169. 'In its broadest acceptation it means the general power of the state to preserve and promote the public welfare even at the expense of private rights.' *Tacoma v. Boutelle*, 61 Wash. 434, 112 Pac. 661. 'The strength of the police power lies in the fact

that it is not a subject of contract; that it cannot be bartered or bargained away.' *State ex rel. Webster v. Superior Court*, 67 Wash. 37, 120 Pac. 861. 'That the exercise of such power may be hampered or restricted to any extent by contracts previously made between individuals or corporations, is inconceivable.' *Cowley v. Northern Pac. R. Co.*, 68 Wash. 558, 123 Pac. 998, 41 L. R. A. (N. S.) 559. The foregoing principles make it clear that it is within the power of the state to enact and enforce police regulations, even though to do so may render less valuable certain contracts between individuals and totally abrogate others. If the principle were not sound, the result would be that individuals and corporations could, by private contract between themselves, in anticipation of legislation, render of no avail the police regulations of the state, no matter how vital or necessary such regulations might prove to be for the public good. But the reasoning upon which the principle rests is fully stated in the cases above cited, and it is not necessary to enlarge upon it here. It is sufficient to say that the contracts between the city and the interveners is not unlawfully affected by the act of the legislature here in question."

We are of the opinion, therefore, that, as to the employees of the respondent engaged in construction work, the state was entitled to a judgment for the amount alleged in the complaint. As to the employees engaged in the operation of the lines of the respondent, we are of the opinion that the act does not apply to them, under the allegations of the answer to the effect that the respondent is engaged in interstate commerce; that such employees are engaged in operating the system for handling interstate messages; that a large percentage of the business actually done for the years mentioned in the complaint consisted in interstate messages; and that it is impossible to segregate or separate the time when the employees were engaged in interstate commerce from the time that they were engaged in intrastate commerce. Section 18 of the act

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under consideration (chapter 74, Laws of 1911, page 367; Rem. Code, § 6604-18), provides as follows:

"The provisions of this act shall apply to employers and workmen engaged in intrastate and also in interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, . . ."

The employees who are engaged in operating the telegraph lines and in handling interstate and intrastate messages are, no doubt, engaged in interstate commerce. It is clear that the Congress of the United States may establish a rule of liability and a method of compensation for such employees. This act, therefore, by its terms, applies to such persons only to the extent of their mutual connection with intrastate work, which shall be clearly separable and distinguishable from interstate or foreign commerce. Under the allegation of the answer, this work is not clearly separable and distinguishable as to those employees. If this is true, the act does not apply.

All the constitutional questions raised by the answer have been decided by this court and by the supreme court of the United States in *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466; *State v. Mountain Timber Co.*, 75 Wash. 581, 135 Pac. 645, L. R. A. 1917D 10, and *Mountain Timber Co. v. Washington*, 243 U. S. 219, Ann. Cas. 1917D 642, and it is therefore unnecessary to again enter into a discussion of those questions.

For the reasons hereinabove stated, the judgment of dismissal is reversed, and the cause is remanded with instructions to enter a judgment in favor of the appellant for the compensation due for employees who

were engaged in the construction of telegraph lines, and to permit a reply to the answer of the respondent alleging in substance that the time of the employees engaged in intrastate work is not clearly separable from the time of those engaged in interstate commerce.

ELLIS, C. J., PARKER, FULLERTON, MAIN, and HOLCOMB, JJ., concur.

[No. 14377. Department One. April 29, 1918.]

O. A. MILLER, *Respondent*, v. W. I. REEVES *et al.*,
Appellants.¹

APPEAL—REVIEW—FINDINGS. Where the facts in an action tried to the court rest entirely upon oral evidence of witnesses testifying before the court, great weight is given the conclusions of the trial judge, and the findings will not be disturbed unless the evidence clearly preponderates against them.

ANIMALS—VICIOUS ANIMALS—HARBORING—INJURY TO PERSONS—LIABILITY. A person harboring a vicious dog, knowing its vicious propensities, is liable in damages for injuries it may cause, although not its owner.

SAME—LIABILITY OF KEEPER. A person keeping a dog at his premises and undertaking to control its actions is the owner or keeper within the law making him liable for injuries caused by it.

Appeal from a judgment of the superior court for Skagit county, Brawley, J., entered January 2, 1917, upon findings in favor of the plaintiff, in an action in tort, tried to the court. Affirmed.

Cooley, Horan & Mulvihill and Geo. M. Mitchell, for appellants.

Livermore & Hanson, for respondent.

FULLERTON, J.—The respondent, when going onto the premises of the appellants on a business errand,

¹Reported in 172 Pac. 815

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was bitten by a dog. For the injuries suffered, he brought this action in damages. The cause was tried by the court sitting without a jury, and resulted in a judgment against the appellants in the sum of \$1,000. This is an appeal from the judgment entered.

The evidence upon the part of the respondent tended to show that the dog was a stray, coming voluntarily upon the premises of the appellants, where it was harbored and cared for by them. It was in evidence that the appellants at times kept the dog tied on the premises, a part of the time in the woodshed, and at other times in the yard; that, at one time, it left the premises, when one of appellants (Mrs. Reeves) went after it and brought it back; that, at another time, Mrs. Reeves desired to leave the home for a short time, when the dog was given in charge of an employee of the appellants to be cared for until her return. The vicious propensity of the dog was also shown, and evidence introduced tending to show knowledge on the part of the appellants of such vicious propensity. Indeed, the respondent testified that, when he reached the porch of the residence, he was heard by Mrs. Reeves, who came hurriedly down the stairway, calling to him to "look out for the dog."

On the other side, much or all of this was denied by the appellants and their witnesses. The appellants testified further that they never did harbor the dog; that they had repeatedly tried to drive it away; that they had complained to the town marshal of his presence on their premises, and had sought to have it removed by that officer; that they never fed the dog, and that the only time it was tied up by them was after it had bitten the respondent, and that it was then tied so that it could be found by the marshal, who had been sent for to remove and kill it.

The appellants' principal contention is that the evi-

dence is insufficient to justify the judgment. It is not disputed that there was evidence sufficient to make a case for a jury, and that, had the cause been tried by a jury, a verdict in favor of the respondent would have been conclusive upon the court. But it is argued that, since this court tries the case *de novo* and must review the evidence, it cannot be justly found upon such a review that the evidence preponderates in favor of the respondent. Looking at the evidence from the type-written record, it must be confessed that this argument is somewhat persuasive. Certain it is that we would not reverse the court's conclusion had it been for the other side. But where a case rests for its facts entirely upon the oral evidence of witnesses testifying before the court, great weight is always given to the conclusions of the trial judge. He has a distinct advantage in determining the truth, which this court has not. He can observe the manner and demeanor of the witnesses when testifying, which the reviewing court cannot do, and testimony appearing evenly balanced when viewed from the record may not appear so when heard from the mouths of the witnesses themselves. For this reason, this court has adopted the rule in such cases that it will not disturb the findings of the trial judge unless it is made to appear clearly that the evidence preponderates against its conclusions. Here we cannot say it does so and, following the rule, must affirm the findings.

That a person harboring a vicious animal, knowing of its vicious propensities, although not its owner, is liable in damages for the injuries it may cause another, is well settled by the authorities. In the English case of *McKane v. Wood*, 5 C. & P. 1, it is said:

"The harboring a dog about one's premises, or allowing him to resort there, is a sufficient keeping of the dog to support this form of action."

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In 3 Corpus Juris, 106, the rule is laid down in this language:

"A man may own an animal and yet not be its keeper. The word 'keeper' is equivalent to 'the person who harbors.' Harboring means protecting, and one who treats a dog as living at his house, and undertakes to control his actions, is the owner or keeper within the meaning of the law."

For a collection of the American cases on the question see *Wood v. Campbell*, Ann. Cas. 1914B 606, and the note thereto.

The judgment is affirmed.

ELLIS, C. J., PARKER, MAIN, and WEBSTER, JJ., concur.

[No. 14404. Department One. April 29, 1918.]

KAHLOTUS GRAIN & SUPPLY COMPANY, *Appellant*, v.
JOHN BLAIR, *Respondent*.¹

EVIDENCE—PAROL EVIDENCE—EXECUTION OF CONTRACT. Oral evidence tending to show that no contract was in fact entered into by defendant is not inadmissible as tending to vary the terms of a memorandum of sale purporting to be signed by defendant's agent, the issue being whether the agent was acting for defendant or a third person.

FRAUDS, STATUTE OF—MEMORANDUM OF SALE—DESIGNATION OF PARTIES. A memorandum of the sale of wheat signed by the seller, must designate the purchaser, in order to satisfy the statute of frauds.

Appeal from a judgment of the superior court for Franklin county, Truax, J., entered May 18, 1917, upon the verdict of a jury rendered in favor of the defendant, in an action on contract. Affirmed.

M. L. Driscoll and Tustin & Chandler, for appellant.
Timothy A. Paul, for respondent.

¹Reported in 172 Pac. 818.

PARKER, J.—The plaintiff company seeks recovery of damages from the defendant, Blair, which it claims as the result of his failure to furnish and deliver wheat to it in compliance with a written memorandum of contract for the sale thereof, which memorandum with the signature thereto, the plaintiff claims, reads as follows:

“8/5/16

“Bot from John Blair 1000 sax early Bart Wheat at 1.02 sacked per bushel 1916, October Delivery to Kahlotus Grain & Supply Co.

“(Signed) John Blair,
“Kahlotus Grain & Supply Co.,
A. F. Phillipay, Mgr.”

“Filed 8-10-16

Trial in the superior court for Franklin county, sitting with a jury, resulted in verdict and judgment in favor of the defendant, from which the plaintiff has appealed to this court.

The plaintiff, in its complaint, having pleaded by copy the contract as above quoted, respondent demurred to the complaint upon the ground, among others, that the written memorandum pleaded is void and unenforceable as a contract, in that it does not comply with our statute of frauds. The demurrer being by the court overruled, respondent answered, denying, in effect, that the contract pleaded was ever executed or entered into by the parties purporting to have signed it, and affirmatively alleged:

“(1) That no note or memorandum in writing of the alleged bargain for the sale of said wheat was made or signed by the defendant herein or by any person by him thereunto lawfully authorized.

“(2) That said alleged contract evidenced by said ‘Exhibit A’ is void and not binding upon said defendant.”

While it is conceded that, on August 5, 1916, the respondent signed the memorandum above quoted, it

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was conclusively proven by the testimony and admissions of A. F. Phillippay, the manager of appellant, that he wrote the words and figures following the signature of respondent upon the memorandum sometime in the month of September, a month or more after the signing of it by respondent, and that, up to that time, no writing was upon the paper following the signature of respondent. It is also conclusively shown that respondent had no knowledge whatever of any writing or signature of any one having been put upon the memorandum following his own signature until sometime after Phillippay had written the additional words and figures thereon. In so far as the entering into the contract between appellant and respondent became a question of fact, apart from the question of the statute of frauds, the evidence was directed almost wholly to the question of whether the contract as made, or attempted to have been made, was one between respondent and Phillippay, as agent of appellant, or one between respondent and Phillippay, as agent of one Houser.

The contentions of counsel for appellant are directed almost wholly to their claims that the trial court erred in refusing to strike out all evidence received upon the trial other than that relating to the difference between the contract price of the wheat, as shown by the memorandum, and its market value on October 31, 1916, which would determine the amount of appellant's recovery, if any, it being conceded that no wheat was delivered by respondent to appellant; and that the trial court erred in refusing to direct the jury to find in appellant's favor, leaving only the amount of its recovery to be determined by the jury. The argument is, in substance, that all of this evidence was, in effect, evidence tending to vary and contradict the terms of the written memorandum of contract of sale. A critical statement of the evidence might show that some of it could possi-

bly be regarded as tending to vary the terms of a contract made, or attempted to be made, between respondent and Phillipay, as agent for Houser. That, however, is not the contract here sued upon. In so far as the evidence touched the question of the making or attempted making of such a written contract, or the varying of its terms, if it was made, the evidence was material to this controversy upon the question of whether the alleged contract between respondent and Phillipay, as agent of appellant, was in fact made. It seems to be the settled law that the receiving of evidence for the purpose of disputing, and which tends to dispute, the actual making of the contract sued upon is not in violation of the rule excluding evidence varying or contradicting the terms of a written instrument. 20 Cyc. 319. In so far as the making of the alleged contract between respondent and Phillipay, as agent of appellant, is concerned, respondent denied the making of any such contract. He was not trying to vary the terms of any such contract, though his evidence did tend to show that the written memorandum had reference to another contract in terms differing somewhat from the memorandum, but this evidence did tend to show that there was in fact no contract entered into between respondent and appellant. All negotiations were had between respondent and Phillipay, and the evidence fully warranted the jury in believing that, in all such negotiations, respondent believed that Phillipay was acting as agent for Houser and not for appellant. The jury manifestly, as their verdict shows, believing this, might well conclude that there never was any contract between respondent and appellant.

It might well be argued that there could, in no event, be any recovery upon this memorandum as a contract because it fails to name a purchaser, especially when read apart from the signature of appellant, which was

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placed on the paper long after the date of its signing by respondent and without his knowledge. Conceding, for argument's sake, that it might not have been necessary for a purchaser to sign the memorandum to render it enforceable against respondent, in so far as the statute of frauds is concerned, it, of course, was necessary that a purchaser as well as a seller should be designated in the memorandum to satisfy the statute. *Arbogast v. Johnson*, 80 Wash. 537, 141 Pac. 1140. However, we leave this question undecided.

The judgment is affirmed.

ELLIS, C. J., FULLERTON, MAIN, and WEBSTER, JJ.,
concur.

[No. 14431. Department Two. April 29, 1918.]

D. O. PRATT, *Respondent*, v. ARCADIA ORCHARDS
COMPANY, *Appellant*.¹

VENDOR AND PURCHASER—CONTRACT—RIGHTS OF PURCHASER—OPTION AND ELECTION—CONSTRUCTION. Under a contract for ten acres of land at the agreed price of \$2,500, entitling the purchaser, after paying one-fourth or more of the price, to a deed for a proportionate part upon ceasing payments, "except that no fractional part of an acre shall be deeded under this provision," the purchaser, after having paid for more than one-fourth of the land, was entitled to as many acres as his money would pay for; and having been in default prior to the expiration of the contract, a demand by letter for an absolute deed for the acres paid for is a sufficient notice of his election under the option.

SAME. In such a case, the fact that the purchaser remained in possession of and cultivated the entire tract after the date of the expiration of the contract, does not amount to an election to take the entire tract or an abandonment or waiver of his rights under the option and election theretofore matured.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered December 8, 1916,

¹Reported in 172 Pac. 918.

upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

Cullen, Lea & Matthews, for appellant.

Post, Russell, Carey & Higgins, for respondent.

HOLCOMB, J.—The same form of contract as that in controversy here was construed and the measure of recovery by the vendee determined in *Johnson v. Arcadia Orchards Co.*, 91 Wash. 289, 157 Pac. 685.

In this case, the expiration of the contract was December 1, 1914. At that time respondent pleaded, appellant admitted, and the court found, that the respondent had paid on the contract a total of \$930 upon the purchase of ten acres, while the purchase price of \$2,500, with interest accrued, then amounted to \$3,576.80, as alleged, admitted, and found. The contract providing that no fractional parts of an acre should be conveyed under the option contained in paragraph 9 (see *Johnson case, supra*), the court found that, upon the expiration of the contract, respondent, in accordance with the decision in the *Johnson case*, was entitled to two acres as fully paid for, of the *pro rata* value of \$500.

Appellant contends that the court erred in making finding number four, as follows:

“And on or about April 1, 1914, the plaintiff notified the defendant of his election to take such proportionate part of said ten-acre tract as he would be entitled to receive under said paragraph 9 of said contract of December 1, 1909.”

In the *Johnson case* it was said:

“He could not demand a deed before the day of the expiration of the contract; and inasmuch as the contract did not require him to demand it at all, and since, from the fact of respondent having ceased to make payments when he had paid more than one-fourth of the

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purchase price, it was to be presumed by appellant that he would avail himself of the alternative stipulation in his contract to receive the one acre of land selected by appellant, there was nothing for respondent to do but wait until January 20, 1915, for his deed to one acre."

While, as there stated, the purchaser could not *demand* or enforce a deed before the date of the expiration of the contract, under the option in the contract, nevertheless he could notify the vendor that he would avail himself of the option contained in the contract at any time when he was in default and had paid sufficient to be entitled to one acre or more, excluding fractional parts of acres. Respondent notified appellant by letter on April 1, 1914, in response to some notice or demand of appellant, that he desired that the company make him an absolute deed to a certain amount of land covering the amount of money which he had already paid, as provided for in the contract. It is true the letter contains a further suggestion that the company make him a deed for the remainder of the land and allow him in return to make a mortgage for the remainder of the purchase money. But there was no provision for the latter suggestion or notice in the contract, and appellant was at liberty to disregard it.

On June 15, 1916, appellant gave notice of cancellation of contract to respondent, and on July 7, 1916, respondent renewed his demand for the conveyance of the *pro rata* part of the land to which the money that he had paid would entitle him under the option contained in paragraph nine of the contract.

Paragraph nine was certainly clear and explicit, and meant what it said. It gave the option to the purchaser, when he had paid at least one-fourth of the purchase price, to cease further payments and be entitled, at the expiration of five years from the date of the contract, to such a proportionate part of the land

as the amount so paid shall bear to the purchase price and accrued interest, except that no fractional part of an acre shall be deeded under this provision. Under the contract, therefore, respondent, having paid more than one-fourth of the purchase price, but not quite enough to obtain one-fourth of the land or the value thereof under the fractional part of an acre provision, was entitled to as many acres as his money would pay for or the value thereof; in this case, one-fifth of the acres purchased, or two acres. And having been in default in payment of some installments on April 1, 1914, prior to the expiration of the contract, he gave sufficient notice to appellant that he desired to take the proportionate part of the ten-acre tract to which he was entitled under the option contained in the contract. This was sufficient to constitute notice of his election and to require respondent to comply with the option.

It is also contended that the court erred in making finding of fact number six, finding the amounts due and the amounts paid by respondent. These allegations were admitted by the pleadings and the finding cannot be questioned.

It is further contended by appellant that respondent by his conduct elected to perform that part of the contract which related to the purchase of the ten acres in its entirety, and by so electing and not making his demand within the time prescribed by the agreement, waived and abandoned any and all rights which he might have had to the two acres of land according to the terms of paragraph nine of the agreement. This contention is based upon the fact that respondent cultivated the entire ten acres in the spring and summer of 1915, after the date of the expiration of the contract, and raised potatoes between the trees on the land, and also paid a small sum to appellant for caring for the

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orchard; thus, as appellant claims, reaffirming the contract as an entirety.

These acts certainly did not mislead appellant to its injury with respect to the option contained in the contract. Although the five years had expired and the respondent was delinquent in his payments on the ten-acre tract, he still had the clear and positive right to option contained in the contract. That right had matured.

The judgment of the trial court was correct and is affirmed.

ELLIS, C. J., MOUNT, CHADWICK, and WEBSTER, JJ., concur.

[No. 14464. Department Two. April 29, 1918.]

ELIZABETH HASTINGS, as *Executrix etc.*, Respondent, v.
ALTA AGNES HASTINGS, Appellant.¹

JUDGMENT—DEFAULT—FAILURE TO ANSWER—JURISDICTION. A default against a defendant is not without jurisdiction because of a subsequent amendment of the complaint, where he was served with the amended complaint and failed to answer, and appeared as a witness, with ample opportunity to defend.

CANCELLATION OF INSTRUMENTS—DEEDS—ACTIONS—JUDGMENT—EFFECT. In an action by a widow individually and as executrix of her deceased husband's estate to set aside a deed of community property to their son, given in consideration of life support, a judgment vesting the title in her on account of breach by the son and failure of consideration, simply sets aside the conveyance to the son and does not affect the son's rights as an heir to his father's estate.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered December 28, 1916, upon findings in favor of the plaintiff, in an action to cancel a deed, tried to the court. Affirmed.

Harris Baldwin, for appellant.

S. L. Americus, for respondent.

¹Reported in 172 Pac. 833.

MOUNT, J.—The plaintiff brought this action to set aside a deed for failure of consideration. The defendant James Franklin Hastings failed to make an appearance in answer to the complaint and a default judgment was taken against him. Thereafter the plaintiff amended her complaint and the defendant Alta Agnes Hastings made answer thereto, and after trial upon issues joined, the court entered a judgment setting aside the deed and appointing a commissioner to reconvey the real estate to the plaintiff. Alta Agnes Hastings alone appeals from that judgment.

But two errors are assigned, to the effect that the court erred in rendering judgment against James Franklin Hastings on the amended complaint, and in rendering judgment vesting title to the real estate in the plaintiff. We think there is no merit in either of these assignments. Counsel for the appellant argues that, because no amended complaint was served on James Franklin Hastings after the default had been taken against him, the court was without jurisdiction of that defendant. It is not necessary for us to decide in this case whether that defendant should have been served with the amended complaint, because the record before us shows that he was served with both the original and the amended complaints and failed to answer thereto. He appeared as a witness upon the trial. He therefore had ample opportunity to defend if he desired to do so. The court clearly had jurisdiction to render a judgment against him.

It is next argued that the court erred in rendering the judgment vesting the title in Elizabeth Hastings. The record shows without dispute that Elizabeth and Frank Hastings, during the lifetime of the latter, were the owners of the real estate in question as community property. They deeded this property to their son, James Franklin Hastings. The consideration ex-

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pressed in the deed was \$2,000, but the complaint alleged, and the court found, that the real consideration was an agreement by the son to support his mother and father during their lifetime. After the deed was made, the son neglected and refused to support his mother and father, and after the father died the mother brought this action to set aside the deed. She brought the action in her individual capacity and in her capacity as executrix of her husband's estate. The trial court, at the conclusion of the evidence, which is not questioned here, concluded that the consideration for the deed had failed and that the respondent was entitled to have the deed set aside and a reconveyance of the property. The effect of this judgment was to reinstate the property as that of the estate, to be distributed upon final distribution as though the deed had never been made. The judgment of the lower court does not affect the interest of James Franklin Hastings as an heir to his father's estate. It simply sets aside the deed, which was made by the father and mother in the lifetime of the father, and directs that the property be reconveyed.

It seems clear that there is no merit in either of the contentions of the appellant.

The judgment is therefore affirmed.

ELLIS, C. J., HOLCOMB, WEBSTER, and CHADWICK, JJ.,
concur.

[No. 14483. Department One. April 29, 1918.]

THE CITY OF SPOKANE, *Respondent*, v. J. M. KNIGHT,
Appellant.¹

MUNICIPAL CORPORATIONS—USE OF STREETS—MOTOR VEHICLES—LICENSE TAX—POWER OF CITY—STATUTES. An ordinance of the city of Spokane (No. C1590, § 23) requiring a license fee of \$5 per year for all vehicles carrying passengers for hire, simply provides a license tax, and hence is not rendered void by Rem. Code, § 5562-34, providing that local authorities shall have no power to pass or enforce any ordinance requiring of operators of motor vehicles any license other than an occupation license or tax.

LICENSES—OCCUPATION TAX—CARRIAGE FOR HIRE—PERSONS AFFECTED—UNDERTAKERS. An undertaker, operating an automobile for carrying passengers for hire to and from the cemeteries in funerals conducted by him is also engaged in "carrying passengers for hire" notwithstanding his occupation as an undertaker and is subject to the occupation tax therefor, there being no exemptions from the license tax specified.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered April 5, 1917, upon a trial and conviction of violating an ordinance requiring a license fee for the operation of automobiles for hire. *Affirmed*.

Carl W. Swanson, for appellant.

PARKER, J.—The defendant, Knight, was charged with the violation of an ordinance of the city of Spokane, in that he carried passengers for hire in his automobile without having paid a license fee therefor as required by the ordinance. He was adjudged guilty and fined in the police court of the city, and having appealed therefrom to the superior court for Spokane county, was therein again adjudged guilty and fined, from which judgment he has appealed to this court.

Appellant is an undertaker, maintaining his principal place of business in the city of Spokane. He has

¹Reported in 172 Pac. 823.

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an automobile which he uses to ride in himself in going to and returning from residences and cemeteries while conducting funerals. He did not use this automobile for hire generally, but he did use it for hire in the carrying of passengers therein, consisting of families of deceased persons and their friends, from residences to cemeteries and return while conducting funerals, whenever opportunity offered for such use for hire. At the time in question, while conducting a funeral, appellant conveyed the family of the deceased from a residence in the city to a cemetery outside the city and return. He charged and collected compensation for this service in addition to his charges for other services as an undertaker. He had complied with the provisions of ch. 142, Laws of 1915, p. 385, as that law then existed, relating to the licensing of automobiles for hire, and had thereby procured a state license for hire for the automobile in question.

At the time of so carrying these passengers for hire by appellant, there was in force an ordinance of the city reading in part as follows:

"Every person, firm or corporation who shall by means of any vehicle carry any person or persons to or from any point within the corporate limits of the city of Spokane for hire shall pay a license fee of five dollars (\$5) per year for every vehicle so used; provided, that nothing herein contained shall be considered to apply to railroad or street railroad cars, or hearses, ambulances, or vehicles used exclusively for carrying pall bearers, nor to stages running on regular schedule to points outside of the city." Ordinance No. C1590, § 23.

There was also then in force ch. 142 of the Laws of 1915, p. 396, § 34 thereof reading in part as follows:

"The local authorities shall have no power to pass or enforce any ordinance, rule or regulation requiring of the owner or operator of any motor vehicle, any license

other than an occupation license or tax which may be levied in only one city or town when such motor vehicle is engaged in inter-city service, or permit to use the public highways except as herein provided or to exclude or to prohibit any motor vehicle whose owner has complied with the provisions of this act from the free use of the public highways, and all such rules, ordinances and regulations now in force are hereby declared to be of no validity or effect." Rem. Code, § 5562-34.

It is contended in appellant's behalf that the provisions of the ordinance above quoted were rendered void by the enactment of § 34 of the Laws of 1915, p. 396, above quoted from, and that the city was thereby divested of the power to enforce the license provisions of the ordinance. It seems to us that but a casual reading of the law shows that this contention is untenable. The quoted portion of the ordinance purports to do nothing more than require the payment of an "occupation license tax," and the law plainly reserves this power in local authorities, though it in general terms prohibits local authorities from regulating the use of automobiles. The portion of the ordinance brought to our attention does not indicate that the license tax therein provided for is anything more than a revenue measure. The ordinance seems to us to clearly fall within the power which the legislature has reserved to the local authorities.

Contention is further made in appellant's behalf that, by the operation of his automobile for hire in the manner he admits he operated it for hire on the occasion in question and other like occasions, he was not doing so as an occupation. The argument seems to be that his occupation was only that of an undertaker. Plainly this operation of his automobile for hire was not within any of the exemptions from the license tax specified in the ordinance. The argument is, in effect, that appellant could furnish and operate for hire all the

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passenger carrying vehicles attending funerals conducted by him without paying the ordinance license tax therefor. We are of the opinion that, while, generally speaking, appellant's occupation was that of an undertaker, he was also engaged in the occupation of carrying passengers for hire when he operated his automobile as he did on the occasion in question and when he so operated it for hire on other like occasions.

It seems plain to us the judgment must be affirmed. It is so ordered.

ELLIS, C. J., MAIN, and FULLERTON, JJ., concur.

WEBSTER, J., took no part.

[No. 14509. Department Two. April 29, 1918.]

In the Matter of the Estate of MARY M. PARKES.
CHARLES H. PARKES, *Appellant*, v. J. H. BURKHART *et al.*,
Respondents.¹

EVIDENCE—JUDICIAL NOTICE—JUDICIAL PROCEEDINGS. Upon a contest in probate over claims and the distributive shares, the lower court takes judicial notice of its own records in the probate proceedings, and on appeal the supreme court may notice judicially all that the lower court may; hence a transcript of the probate proceedings is properly filed on appeal, as part of the appellant's petition below.

WILLS—ELECTION—RATIFICATION OF WILL. One who takes specific devises under a will makes an election and cannot defeat collateral devises to others passing certain properties in fee or charge them with a trust, on the ground that the testatrix held it in trust for him under an agreement to will him all her property; and by offering the will as a valid testamentary disposition so far as it passes property to him, he ratifies it in its entirety.

TRUSTS—EXPRESS TRUSTS—PAROL PROOF. Where an heir conveyed an interest in an estate to the deceased widow in consideration of the latter's agreement to will all the estate to him upon her death, the trust, if any, was an express trust, which cannot be established by parol where it affects real property.

¹Reported in 172 Pac. 908.

FRAUDS, STATUTE OF—DAMAGES FOR BREACH OF CONTRACT UNDER STATUTE. Where an express trust under an oral contract to will real estate cannot be established by proof, under the statute of frauds, no damages can be awarded for breach of such contract.

EXECUTORS AND ADMINISTRATORS — CLAIMS — FILING AND ALLOWANCE—BAR—WAIVER. The filing of a claim against an estate covering certain years, is not a waiver of all items of like character for different years not included, and allowance of the first claim does not operate as a former adjudication barring a second claim, filed within the time for presenting claims against the estate.

SAME—CLAIMS — SUFFICIENCY — PLEADING. A claim against an estate for services by a relative need not state facts overcoming the presumption that they were gratuitous, since the same precision is not required as in pleading.

Appeal from an order of the superior court for Pierce county, Card, J., entered October 3, 1917, upon sustaining a demurrer to the petition, dismissing proceedings for equitable relief. Affirmed in part and reversed in part.

Hoppe & Hoppe and Frank H. Kelley, for appellant.

Guy E. Kelly and Thomas MacMahon, for respondents.

PER CURIAM.—Appellant filed a petition in the probate proceedings upon the estate of Mary M. Parkes, deceased, in which he set forth that his father, Charles R. Parkes, died intestate at Tacoma on August 25, 1909, leaving him surviving his widow, Mary M. Parkes, and appellant; that all of the property accumulated by Charles R. Parkes in his lifetime was the community estate of himself and Mary M. Parkes; that Mary M. Parkes was not the mother of appellant, but, by reason of her marriage to appellant's father while appellant was of tender years, the same love, affection, and confidence existed between them as if the relation between them had been that of mother and son; that, while the community estate of

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Charles R. Parkes was in process of settlement, Mary M. Parkes, fearing that, if the estate were distributed according to law—that is, one-half to Mary M. Parkes and the remaining half to appellant—the share of Mary M. Parkes would be insufficient to support and maintain her, proposed to the appellant that, if he would convey to her all his right, title, and interest in his father's estate, she would make a will devising and bequeathing all of the property of which she should die possessed to appellant; that, actuated by his affection and having confidence in Mary M. Parkes, appellant agreed to this proposal, and in accordance therewith duly conveyed all his right, title and interest in his father's estate to Mary M. Parkes; that the proposition and acceptance relied upon were oral; that this oral agreement was partly performed by a conveyance of certain described real estate from Mary M. Parkes to the appellant on December 15, 1913, which property so conveyed was a part of the property received by Mary M. Parkes from the estate of her husband under the agreement between Mary M. Parkes and appellant; that Mary M. Parkes died testate on June 28, 1916, leaving a will in which she named appellant as executor, devised to him certain real estate and bequeathed to him certain personal property, disposing of the remainder, constituting the greater part of her estate, to certain of her collateral relatives.

Appellant then alleges that the value of his distributive share in his father's estate, which under the agreement between himself and Mary M. Parkes he conveyed to her, was \$6,000. He then prays, (1) for a decree establishing the oral agreement between himself and Mary M. Parkes, and that the collateral devisees under the will of Mary M. Parkes be charged with a trust in his favor as to all property received by them under the will of Mary M. Parkes; (2) if this

relief be not granted, then that he be allowed a claim against the estate of Mary M. Parkes in the sum of \$6,000, with interest from the date of his conveyance to Mary M. Parkes under the alleged agreement. On the same day and as part of the same petition, he filed a second claim, in which he recited that, for seven years between the death of her husband and her own death, he rendered certain personal services to Mary M. Parkes and incurred certain expenses for her use and benefit in the sum of \$1,675.80; that theretofore he had filed a claim against the estate of Mary M. Parkes for a part of the above services to the extent only of \$624, under the mistaken belief that he could recover from the estate only for such services as had been performed within three years prior to the death of Mary M. Parkes. This petition was treated as a complaint, and a demurrer thereto was interposed by respondents, which was sustained, and from which this appeal follows.

Respondents have filed in this court a transcript of the probate proceedings in the estate of Mary M. Parkes, which appellant moves to strike. The purpose of that transcript is, of course, to acquaint this court with the various steps taken by appellant, as executor of the estate of Mary M. Parkes, in the settlement and probate of her estate. The motion to strike will be denied. It would serve appellant no good purpose if it were granted, as this court would, for the purposes of the appeal, take judicial notice of all that the lower court properly noticed. The only purpose served by this transcript then is to bring before this court in an orderly way the matters and things of which the lower court took judicial notice. The lower court would, without doubt, take judicial notice of its own records in the very proceeding in which appellant had filed his petition and in which it was called upon to act, and these

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matters of judicial notice were just as much a part of appellant's petition and as properly considered by the court in ruling thereon as if specific reference had been made to them. *French v. Senate of California*, 146 Cal. 604, 80 Pac. 1031, 69 L. R. A. 556.

From these matters of judicial notice, which the lower court was authorized to consider in aid of the demurrer, it appears that, on June 30, 1916, appellant petitioned for the probate of the will of Mary M. Parkes, specifically alleging that the real property in controversy here was the property of decedent; on that day he caused notice to be sent to the state board of tax commissioners, setting forth the names and addresses of these respondents and giving the estimated value of their shares, and also setting forth that the real property given to him by the terms of the will had been deeded to him in the lifetime of decedent; the will which he offered for probate bequeathed to him all the money, notes and mortgages of the estate, and nominated him as executor thereof; he obtained his appointment as executor and filed his oath as such; on July 27, 1916, he inventoried this property as the property of decedent, and caused it to be appraised as such, and caused this inventory and appraisement to be served on the state board of tax commissioners; on August 2, 1916, September 28, 1916, October 26, 1916, January 17, 1917, April 5, 1917, and May 23, 1917, appellant petitioned for and obtained orders permitting him, as executor, to repair the dwellings in the estate which had been devised to respondents; on August 7, 1916, appellant petitioned for and obtained an order permitting him, as executor, to sell the personal property, heirlooms, etc., devised to respondents, and actually did sell them at public auction for less than \$162; on December 28, 1916, as a legatee under the will, he petitioned for a partial distribution to him on his

money legacy, and the court, upon this petition did distribute to him, as legatee under the terms of the will, the sum of \$500; on May 23, 1917, appellant petitioned for an order to sell the real property devised to respondents, in order to pay to himself the alleged debt which he had established upon an *ex parte* application; and by various orders in which he describes the property which he wishes to sell as the property of the estate, he has continued the hearing upon this petition to May 1, 1918, in order that, in the event that this appeal is decided against him, he may still go on with his petition; on June 30, 1917, exactly one year after his appointment as executor, as executor he instituted the present contest.

These facts make a proper case for the application of the doctrine of election. Appellant is seeking to take under the will and, at the same time, set up a right or claim which, if well founded, would defeat the will in so far as it affects respondents. The will expresses a clear intention on the part of the testatrix to pass certain property to appellant and to pass certain other property in fee to respondents. It is well to remember that appellant was not an heir of Mary M. Parkes. Unless, therefore, he takes under the will, he can have no interest in her estate. He cannot, then, offer the will as a valid testamentary disposition of the estate of Mary M. Parkes, in so far as it passes property to him, but regard it of no effect and virtually set it aside as to its other features. It is too well settled that one who accepts a benefit under a will must accept the whole will and ratify every portion of it. *In re Goss' Estate*. 73 Wash. 330, 132 Pac. 409.

Appellant, if we understand his position, does not ask us to disregard this principle. He says he is seeking to sustain the will in all things, but to obtain a decree which shall find that the respondents, as devisees

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under the will, are trustees in equity for appellant. If the will is given effect, then respondents are, and from the death of Mary M. Parkes have been, the owners in fee of whatever was devised to them under the will. If owners in fee, they cannot be held to hold in trust for appellant or any other person. Appellant says this trust he seeks is an implied trust arising by operation of law. In another section of his brief he says, "the facts stated charged the decedent with a constructive or resulting trust and that her devisees would take under the will charged with the same trust." Under the generally accepted meaning of these terms, the facts disclose no implied trust, neither a constructive nor resulting trust. It cannot be an implied trust, for such a trust arises only from the language of the parties where no express trust is declared, but words are used from which the courts infer or imply a trust was intended. Perry, Trusts, § 25. The facts show nothing of this character. It cannot be a constructive trust or, as it is sometimes called, a trust *ex maleficio*, as such a trust only arises where one clothed with some fiduciary or like character, by fraud or otherwise, gains some advantage to himself which the law will not permit him to retain, but decrees that he hold it in trust for the one whom he has defrauded. Perry, Trusts, § 26. Nothing of this kind is pleaded. It is not a resulting trust, for such a trust can never arise from any contract or agreement of parties, but is one which the law presumes from their acts. Perry, Trusts, §§ 27, 134.

It is plain that, if any trust is here created, it arises, not out of the law in the absence of agreement, but directly out of the agreement of the parties pleaded by appellant in his complaint. Appellant is directly seeking the enforcement of the agreement he alleges; an express agreement and an express trust. The facts

pleaded can fit no other form of trust. Where two parties enter into an express agreement in relation to their property, there is no semblance of an implied or resulting trust; if trust of any nature, it is an express trust and subject to all the limitations of such a trust, among which is that it cannot be established by parol where it seeks to affect the title to real property. Many of our cases have so declared the law and they will be found cited in *Arnold v. Hall*, 72 Wash. 50, 129 Pac. 914, 44 L. R. A. (N. S.) 349, and *Nichols v. Capen*, 79 Wash. 120, 139 Pac. 868.

This, in effect, likewise disposes of appellant's second prayer for relief, the \$6,000 claim against the estate. This claim could not be established by proving the alleged agreement. Since it cannot be proved, its failure cannot be proved, and no recovery awarded appellant because Mary M. Parkes failed to carry out her agreement.

What appellant is really seeking to do under this part of his complaint is to recover damages for the breach of a contract he cannot prove. The fact that he seeks to establish it as a claim against the estate does not change its nature. He says in effect, "If the courts will not enforce my agreement with the decedent, then I am entitled to recover the extent of my damage, because (1) the decedent breached the agreement, and (2) because, under the law, the courts cannot enforce it." The agreement is clearly one relating to real property, and since it cannot be proved, there is no way in which the breach or failure can be established.

Appellant's third contention is that the lower court erred in not permitting him to file an additional claim against the estate. Appellant had already presented, and the court had allowed, a claim in the sum of \$624, of the same character but covering different years, and the lower court was of the opinion that the filing of the

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first claim was a waiver of all items of like character not included, and its allowance operates as a former adjudication.

The second claim was filed within the time for presenting claims against the estate, and may, therefore, be regarded as an original claim. We cannot agree with the lower court that, when a claimant against an estate has filed his claim and the same has been allowed, this is a waiver of all liens of a like nature not included; neither can the allowance of a claim have the effect of a judgment so as to raise the bar of *res adjudicata*. The allowance of the claim is its establishment as a charge of indebtedness against the estate. But this allowance is only a qualified allowance, since the heirs and distributees may question it, as they may question any expenditure of the funds of the estate upon the hearing of executor's reports, or at any other due and suitable time.

Respondents argue in support of this part of the judgment that, because of the relationship between the appellant and the deceased, the services will be presumed to be a gratuity, and that there is no plea of any fact that will overcome this presumption. It is not essential that claims against estates should recite the facts with the precision and particularity of a complaint. Whether appellant can substantiate his claim will be determined when he is called upon to do so. Hence the only question now is, Is he entitled to present it to the lower court and be accorded a hearing on it? We think he is. The demurrer to this part of the complaint should have been overruled.

The order appealed from is therefore sustained as to part one of the complaint and reversed as to part two. The cause is remanded with instructions to the lower court to permit the filing of appellant's second claim.

Appellant will recover appeal costs.

[No. 14531. Department One. April 29, 1918.]

CAMERON DOUGLASS *et al.*, *Appellants*, v. WOODBURY
LUMBER COMPANY, *Respondent*.¹

LOGS AND LOGGING—LIEN—BONA FIDE PURCHASER OF LUMBER—LIABILITY—STATUTES. Rem. Code, § 1177, providing that the purchaser of lumber "liened upon" within the thirty days given for the filing of labor liens, in order to be a *bona fide* owner, must pay full value and apply the purchase money to the payment of such *bona fide* claims as are entitled to liens, has no application to lumber sold by the manufacturer away from the mill and passing entirely from his control before any liens are filed; since it applies only to property "liened upon," and by Id., § 1163, the laborer's right of lien is limited to lumber while the same remains at the mill where manufactured, or in the possession and control of the manufacturer.

SAME—LIEN—PURCHASER—LIABILITY FOR ELOIGNMENT—STATUTES. A purchaser of lumber within the thirty days limited to laborers for the filing of liens cannot be held liable under Rem. Code, § 1181, as for an eloignment of lumber "upon which there is a lien," where he took it prior to the filing of any lien, and obtained complete possession away from the mill so that it was not subject to a lien.

Appeal from a judgment of the superior court for Okanogan county, Frater, J., entered May 24, 1917, upon granting a nonsuit, dismissing an action by lien claimants to recover a money judgment against the purchaser of lumber. Affirmed.

J. Henry Smith and *Peter McPherson*, for appellants.

A. J. O'Connor and *Kerr & McCord*, for respondent.

PARKER, J.—The plaintiffs seek recovery of a money judgment against the defendant Woodbury Lumber Company, in the sum of \$2,142, being the amount of the purchase price of lumber sold and delivered by Edward Johnson, the manufacturer thereof, to the defendant, upon which lumber the plaintiffs claim they were entitled to liens aggregating more than that sum

¹Reported in 172 Pac. 906.

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for labor performed by them for Johnson in the manufacture of the lumber. Trial in the superior court for Okanogan county, sitting without a jury, resulted in judgment in favor of the defendant, denying to the plaintiffs the relief prayed for, from which they have appealed to this court.

The facts may be summarized as follows: On June 26, 1915, Edward Johnson was, and for a considerable time prior thereto had been, the owner and operator of a sawmill in Okanogan county. On that day, Johnson sold and delivered to respondent lumber company, in the usual course of business, lumber which had been manufactured by him at his mill, of the value and for the agreed price of \$2,142. The lumber was delivered by Johnson to respondent at the town of Brewster, in Okanogan county, which is some ten miles distant from the mill, which lumber thereupon passed entirely out of the possession and control of Johnson to respondent. On and prior to June 26, 1915, appellants were employed by Johnson in the operation of the mill, and while so employed performed labor in the manufacture of this and other lumber. On that day appellants ceased to perform such labor, at which time there was due them from Johnson for labor so performed, in the aggregate, the sum of \$2,738. Thereafter, and after the sale and delivery of the lumber by Johnson to respondent, and within thirty days after appellants had ceased to perform such labor, they:

“Filed in the office of the county auditor of said county, their several notices of lien upon and against all of said lumber, boxes and box materials and other products of said sawmill and box factory that was then remaining in or about the same, or within the possession or under the control of the said Edward Johnson.”

This quoted language is from appellants' complaint. The lien notices are not in the record before us. There-

after, and within the time prescribed by statute, they commenced an action in the superior court for Okanogan county, seeking foreclosure of their several liens as against Johnson, respondent not being a party to that action, in which action judgment of foreclosure was accordingly rendered against Johnson as prayed for, together with a personal judgment against him in favor of the several appellants aggregating the sum of \$2,738. Thereafter, under an execution and order of sale issued upon the judgment of foreclosure:

“All of the said property of the said Edward Johnson, so liened upon, was by the sheriff of said county, duly and regularly sold, as provided by law and the proceeds of such sale were duly applied toward the satisfaction of plaintiffs’ several judgments and those of other lien claimants who were entitled thereto, *pro rata*, according to the amount of their several judgments, and after deducting the amount of the proceeds of said sale and any and all other payments that have been made on account of said judgments, there remains due and owing thereon by the said Edward Johnson to these plaintiffs the sum of \$2,575.”

This quoted language is also from appellants’ complaint. Thereafter, in June, 1916, appellants commenced this action, seeking recovery of the \$2,142 purchase price of the lumber sold and delivered by Johnson to respondent, apparently upon the theory that their lien rights extended to that lumber and that respondent was liable to them for the value thereof. This statement of the facts is as favorable to appellants as the record will admit of. Indeed, there are other facts appearing in the record which seem to render the case as a whole less favorable to appellants, but our view of the law renders it unnecessary to notice other facts here.

The provisions of our statutes relating to liens upon logs and lumber for labor performed thereon which it

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seems necessary for us to notice here, referring to sections of Remington's Code, are as follows: Section 1162 reads in part as follows:

"Every person performing labor upon, or who shall assist in obtaining or securing sawlogs, spars, piles, cordwood, shingle-bolts, or other timber . . . shall have a lien upon the same for the work. . . ."

This section does not in terms limit the lien rights of loggers to logs while in the possession and control of the owner thereof for whom the labor was performed. Section 1163 reads in part as follows:

"Every person performing work or labor or assisting in manufacturing sawlogs and other timber into lumber and shingles, has a lien upon such lumber *while the same remains at the mill where it was manufactured, or in the possession or under the control of the manufacturer.* . . ."

We have italicized the portion of this section to be particularly noticed as showing the difference in the lien rights of loggers and those performing labor in the manufacture of lumber. Section 1177 reads as follows:

"It shall be conclusively presumed by the court that a party purchasing the property liened upon within thirty days given herein to claimants wherein to file their liens, is not an innocent third party, nor that he has become a bona fide owner of the property liened upon, unless it shall appear that he has paid full value for the property, and has seen that the purchase money of the said property has been applied to the payment of such bona fide claims as are entitled to liens upon the said property under the provisions of this chapter, according to the priorities herein established."

Section 1181 reads as follows:

"Any person who shall eloin, injure or destroy, or who shall render difficult, uncertain or impossible of identification any sawlogs, spars, piles, shingles or other timber upon which there is a lien as herein provided, without the express consent of the person en-

titled to such lien, shall be liable to the lienholder for the damages to the amount secured by his lien, and it being shown to the court in the civil action to enforce said lien, it shall be the duty of the court to enter a personal judgment for the amount in such action against the said person, provided he be a party to such action, or the damages may be recovered by a civil action against such person."

The theory upon which recovery is sought in this action against respondent seems to be that of eloignement on the part of respondent, rendering it liable under §§ 1177 and 1181, above quoted. It should be remembered in this connection that respondent was not a party to the lien foreclosure action, nor did the lien notices or the foreclosure judgment assume to claim or establish any lien against the lumber sold and delivered by Johnson to respondent before the filing of the lien notices. Counsel for appellants rely particularly upon the provisions of § 1177, above quoted. That section, however, does not give a right of action, but only prescribes a rule of evidence touching the good faith of the party purchasing "property liened upon," and it seems to us cannot, in any event, have reference to the purchase of property other than that upon which there is a lien right which can follow the property after it has passed from the possession and control of the owner. This rule would seem applicable to the foreclosure of loggers' liens under § 1162, above quoted from, since that section contains no limit, in terms, as to the lien right there given as the same might be affected by the location or possession of the logs. This rule would also seem applicable in an action claiming recovery under § 1181, above quoted, relating to eloignement. The weakness of counsel's contention lies in the fact that the only liens appellants were entitled to assert were liens upon lumber "while the same remains at the mill where it was manufactured, or in the pos-

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session or under the control of the manufacturer." Manifestly, whatever lien rights appellants had upon the lumber sold and delivered by Johnson to respondent ceased when that sale and delivery were actually made, which, as we have seen, was before appellants filed their lien notices in the office of the county auditor. It is not claimed that this sale and delivery of the lumber were fraudulent on the part of either Johnson or the respondent, in that the transaction was had with any intent on the part of either to defraud appellants.

It seems to us that our decision in *Akers v. Lord*, 67 Wash. 179, 121 Pac. 51, is decisive of this question in favor of respondent. While that case involved claims of liens made by loggers, the liens were claimed under § 1163, above quoted, because the logs upon which the labor had been performed had gone to a mill and been manufactured into lumber, the lumber thereafter being sold and its possession and control having passed from the mill owner, the manufacturer, to a third party before the filing of the lien claims in the office of the county auditor. Disposing of the lien claims, in so far as this manufactured and sold lumber was concerned, Judge Morris, speaking for this court, said:

"It is manifest no lien could be enforced against the lumber after it had been delivered to the railway company and passed beyond the possession and control of appellants. This court has extended the provisions of Rem. & Bal. Code, § 1163, providing a lien upon lumber while the same remains at the mill where it was manufactured, or in the possession or under the control of the manufacturer, to the logger who assists in getting out the logs from which the lumber was manufactured, and who files his lien under § 1162. But the lien cannot be extended beyond the possession and control of the mill company. When, therefore, the mill company delivered this lumber to the railway company upon its right of way, it lost its possession and control thereof,

and no lien could be subsequently filed against it. *Robins v. Paulson*, 30 Wash. 459, 70 Pac. 1113; *O'Connor v. Burnham*, 49 Wash. 443, 95 Pac. 1013.

"These liens were filed December 10. Any eloignment affecting them must have taken place subsequent to that date. There is not a particle of evidence in this record that it did, in so far as the lumber delivered to the railway is concerned. The lower court seems to have been of the opinion that the liens could be sustained so long as the lumber was capable of identification, and that any attempt on the part of the mill owner to change the identification would be an eloignment. The statute, however, makes "possession and control" the foundation of the lien upon the manufactured product, and not identification; and when the mill man loses his possession and control, the lien claimant loses his lien."

It may be said that this is the first positive holding of this court upon the question here presented. It appears, however, that this court has, on former occasions, expressed views quite in harmony with this holding, though possibly not wholly necessary to a decision of the question directly involved. See *Campbell v. Sterling Mfg. Co.*, 11 Wash. 204, 39 Pac. 451; *Munroe v. Sedro Lum. & Shingle Co.*, 16 Wash. 694, 48 Pac. 405; *Robins v. Paulson*, 30 Wash. 459, 70 Pac. 1113; *Forsberg v. Lundgren*, 64 Wash. 427, 117 Pac. 244.

Some other questions are presented in the briefs, but since our conclusion upon the facts, even as claimed by appellants, is that there can in no event be any recovery by them as against respondent, these questions need not be here noticed.

The judgment is affirmed.

ELLIS, C. J., FULLERTON, MAIN, and WEBSTER, JJ., concur.

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[No. 14535. Department Two. April 29, 1918.]

MYER S. RUBENS, *Respondent*, v. MAX RUBENS,
Appellant.¹

APPEAL—REVIEW—FINDINGS. On a trial *de novo* on appeal, the supreme court must examine the evidence and determine what findings should have been made, disregarding testimony erroneously admitted.

PARTNERSHIP—CONTRACT—CONSTRUCTION — DISSOLUTION — NOTICE. Under a partnership agreement providing that if a certain partner should "want" to withdraw before January 1, 1917, he would lose all interest in the partnership, the expression of a desire to withdraw without affirmative action does not dissolve the partnership; and where no notice of dissolution was given prior to January 1, 1917, when suit was brought, he did not lose all interest in the partnership.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered May 24, 1917, upon findings in favor of the plaintiff, in an action to dissolve a partnership, tried to the court. Affirmed.

Smith & Mack, for appellant.

W. W. Clarke and *Carl Ultes, Jr.*, for respondent.

HOLCOMB, J.—This action was brought by respondent for the purpose of dissolving a copartnership, and for an accounting.

Respondent was a stepson of the appellant and had worked for him about twelve years prior to the execution of the contract, which is as follows:

"This agreement made and entered into the 20th day of October, 1914, between Max Rubens, party of the first part, and Myer S. Rubens, party of the second part, Witnesseth:

"That whereas the said party of the first part is the owner of the business carried on by him in the city of Spokane known as the 'Spokane Stove Repair Works'

¹Reported in 172 Pac. 831.

in which said second party has been employed for a number of years by first party, now in consideration thereof and of the mutual benefits to be derived therefrom, it is hereby agreed that after the first day of January, 1915, and for a term of ten (10) years thereafter the said business is to be carried on by said parties as a copartnership under the firm name and style of Spokane Stove Repair Works, the said first party to be the owner of two-thirds interest in all the stock of goods, fixtures, horse and wagon, tools and implements then on hand and the second party to own one-third interest in said stock of goods, etc., and all debts if any owing for goods received in December, 1914, which shall be on hand January 1st, 1915, an inventory of said December goods to be taken on January 1st, 1915.

"No goods shall be bought from now until January 1st, 1915, without the consent of first party. All monies outstanding on January 1st, 1915, shall solely belong to first party, but second party agrees to use his best efforts to collect the same.

"It is agreed that the stock of goods, fixtures, wagon, horse, tools and implements on January 1st, 1915, shall arbitrarily be valued at \$9,000, just as if an inventory had been taken, the goods received in December, 1914, and still on hand on January 1st, 1915, however, to be added hereto.

"The said first party is to receive a salary of \$300 per month and the second party a salary of \$27.50 per week.

"The said first party shall have the right to overdraw his account \$700 per year, and the second party \$200 per year, and neither party can, after the expiration of the first two years, draw out more than 25 per cent in his share of so much of the capital as shall then exceed \$9,000.

"If second party should want the partnership dissolved before January 1st, 1917, he shall lose all his interest as a partner. If he should want to withdraw from the partnership before the first day of January, 1920, he is to lose 50 per cent of his share of the profits then made, that is, he is to receive 16 2-3 per cent of

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the net profit made during the five years; if he should withdraw after January 1st, 1920, but before January 1st, 1925, he is to lose 25 per cent of his share of all the net profits made after January 1st, 1915, that is, he shall in settlement be entitled only to 25 per cent instead of 33 1-3 per cent of the net profits, in addition to the \$3,000, the value of one-third of the stock on hand January 1st, 1915.

"All disbursements have to be made by check.

"During the life of the copartnership no goods can be ordered except by the consent of both parties.

"First party agrees to advance to the copartnership during January, 1915, two thirds of sum needed to pay necessary expense, to be repaid to him as soon as possible, and second party agrees to advance one-third of such sum.

"In witness whereof, the parties have hereunto and to a duplicate hereof set their hands and seals this 20th day of October, 1914.

"Max Rubens (Seal)

"Myer S. Rubens (Seal)"

Some quarreling and bickering were engaged in between the appellant and respondent without defeating the ends of the partnership relation. No notice of dissolution was given appellant until the service of the complaint in this action, February 1, 1917.

By the decree of the court, respondent was awarded the sixteen and two-thirds per cent of the profits, together with the \$3,000, the one-third interest in the partnership after deducting the overdraft, leaving a total of \$4,672.12.

The appellant makes eight assignments of error:

I. The court erred in admitting the testimony of appellant's attorney, over the objection of the appellant. Both the appellant and respondent went together to the attorney's office and consulted in regard to the making of the contract. Respondent claims that the attorney's evidence was admissible, although the general rule, Rem. Code, § 1214, is that any communica-

tions made by the client to the attorney, and *vice versa*, in the course of professional employment are privileged; claiming that there is a well settled exception to this general rule where a third party is present at the time of the communication and such third party later becomes a party to a suit against the client. This being an equity case, a trial *de novo* in this court, we may decide it by disregarding the testimony of the attorney. On a trial *de novo* on appeal the supreme court must examine the evidence and determine what findings should have been made. *Bunger v. Pruitt*, 73 Wash. 569, 132 Pac. 237.

Assignments of error 2, 3 and 4 are without merit and we will not discuss them further.

Assignments of error 5, 6, 7, and 8 relate to the entering of a judgment for the \$3,000 for respondent's one-third interest in the partnership, and may be discussed as one. This brings us to the construction of the contract and such evidence as may aid in its proper construction. In the first paragraph of the contract we find the clause, "the said first party [appellant] to be the owner of two-thirds interest in all the stock of goods, fixtures, horse and wagon, tools and implements then on hand, and the second party [respondent] to own one-third in said stock of goods, etc." The forfeiture or dissolution clause is as follows:

"If second party should want the partnership dissolved before January 1st, 1917, he shall lose all his interest as a partner. If he should want to withdraw from the partnership before the first day of January, 1920, he is to lose 50 per cent of his share of the profits then made, that is, he is to receive 16 2-3 per cent of the net profits made during the five years; if he should withdraw after January 1st, 1920, but before January 1st, 1925, he is to lose 25 per cent of his share of all the net profits made after January 1st, 1915, that is, he shall in settlement be entitled only to 25 per cent in-

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stead of 33 1-3 per cent of the net profits, in addition to the \$3,000, the value of one-third of the stock on hand on January 1st, 1915."

Upon reading this clause carefully, it is plain that the respondent is to lose all interest in the partnership if he should want it dissolved before January 1, 1917, but if he should want to withdraw before the 1st day of January, 1920, he is to lose only fifty per cent of his share of the profits then made; that is, he is to receive sixteen and two-thirds per cent of the net profit made during the five years.

There is some contention as to the meaning of the word "want," appellant asserting that, inasmuch as respondent expressed a desire or "wanted" to dissolve the partnership, that fact *ipso facto* dissolved the partnership and forfeited the contract. But as no affirmative action was taken by respondent, either by notice or abandonment, the activities of the partnership continuing until this suit, and no dissolution taking place prior to January 1, 1917, this contention can avail appellant nothing.

Although the contract could have been more certain, we find that, disregarding the testimony of appellant's attorney, there is sufficient evidence to sustain the trial judge's findings. We therefore conclude that the judgment should be affirmed. It is so ordered.

ELLIS, C. J., CHADWICK, MOUNT, and WEBSTER, JJ.
concur.

[No. 14547. Department One. April 29, 1918.]

THE CITY OF SEATTLE, *Appellant*, v. H. N. ROTHWEILER,
Respondent.¹

MUNICIPAL CORPORATIONS—STREETS—SPEED—REGULATION—STATUTES—POWER OF CITY. A city has no power by ordinance to limit the rate of speed at crossings within the business district, under Laws 1917, p. 640, § 34, providing that local authorities shall have no power to pass or enforce any ordinance or regulation governing the speed of any motor vehicle except as provided in the act, provided, however, that the act shall not be construed as limiting their power to make rules and regulations governing traffic conditions not in conflict with the act; inasmuch as the act expressly prohibits it, and the proviso, if conflicting, must give way.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered November 21, 1917, dismissing a prosecution for the violation of an ordinance on appeal from a conviction in the police court. Affirmed.

Hugh M. Caldwell, Patrick M. Tammany, and George A. Meagher, for appellant.

Roberts, Wilson & Skeel, for respondent.

Alfred H. Lundin and Everett C. Ellis, amici curiae.

FULLERTON, J.—The respondent was accused, by a complaint filed in the police court of the city of Seattle, of having driven an automobile over one of the city streets in excess of the speed limit fixed by an ordinance of the city. On being brought before the police judge, he interposed an objection to the jurisdiction of the court, based on the ground that the ordinance on which the complaint was founded was invalid. His objection was overruled, whereupon he admitted the facts and was adjudged guilty and sentenced to pay a fine. From the judgment entered, he appealed to the supe-

¹Reported in 172 Pac. 825.

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rior court, where he renewed the objection made in the police court. The objection was there sustained and the complaint dismissed. The city appeals to this court.

The ordinance of the city of Seattle under which the respondent is charged reads as follows:

"Section 66. No person shall drive or operate any motor vehicle at a rate of speed faster than twelve miles per hour at any crossing within the main, thickly settled, or business portion of the city, nor within 100 yards of any school house on school days between eight o'clock in the morning and five o'clock in the evening, nor in any portion of the city, faster than twenty miles per hour." Ordinance No. 37,434.

The statute held by the superior court to invalidate the ordinance is found in the Laws of 1917, at page 640, and reads:

"Section 34. The local authorities shall have no power to pass or enforce any ordinance, rule or regulations governing the speed of any motor vehicle, or requiring of the owner or operator of any motor vehicle, any license other than an occupation license or a tax which may be levied in only one city or town when such motor vehicle is engaged in inter-city service, or permitted to use the public highways except as herein provided or to exclude or to prohibit any motor vehicle whose owner has complied with the provisions of this act from the free use of the public highways, and all such rules, ordinances, and regulations now in force are hereby declared to be of no validity or effect: *Provided, however,* That nothing herein shall be construed as limiting the power of the county commissioners or local authorities to make, enforce, and maintain ordinances, rules and regulations governing traffic in addition to the provisions of this act affecting motor vehicles, but not in conflict therewith."

The ordinance was passed subsequent to the adjournment of the legislative assembly of 1917, and was made to take effect at the time the statute took effect.

The contention of the city is that, notwithstanding a statute may supersede the existing municipal regulations governing the speed of motor vehicles which are in conflict with it, it does not supersede ordinances regulating speed, nor prevent the passage of such ordinances which are not so in conflict, and it is argued that this statute expressly permits the enactment of ordinances governing traffic by motor vehicles not in conflict therewith. But we cannot so construe the statute. In the enacting part of the statute it is expressly and in terms provided that no municipality shall have power to pass or enforce any ordinance, rule, or regulation governing the speed of motor vehicles, and all such rules and ordinances then in force are declared to be of no validity or effect. If there is any modification of the specific declaration it is found in the proviso of the act. It would seem that the language there used could be construed as operative without nullifying these express provisions; but if this be not so and the two provisions are contradictory, it is the proviso and not the principal part of the statute which must give way. *State ex rel. Chamberlin v. Daniel*, 17 Wash. 111, 49 Pac. 243; *Tsutakawa v. Kumamoto*, 53 Wash. 231, 101 Pac. 869, 102 Pac. 766; *State v. Robinson*, 67 Wash. 425, 121 Pac. 848; *State ex rel. Board of Tax Commissioners v. Cameron*, 90 Wash. 407, 156 Pac. 537.

A city may, as we have many times held, enact ordinances on subjects covered by the state statutes, operative within the jurisdiction of the city, when the statute does not expressly prohibit it. *Allen v. Bellingham*, 95 Wash. 12, 163 Pac. 18. In this statute, however, there is such an express prohibition. An ordinance of a city on the same subject-matter is therefore void.

The judgment is affirmed.

ELLIS, C. J., PARKER, MAIN, and WEBSTER, J.J., concur.

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[No. 14557. Department Two. April 29, 1918.]

FRED E. BEERS, *Respondent*, v. HORACE WALKER *et al.*,
Appellants.

IRENE BEERS, *Appellant*, v. FRED E. BEERS, *Respondent*.¹

HABEAS CORPUS—CUSTODY OF CHILD—DEFENSES. Where a divorced wife has for years continuously violated the order for the custody of a child, she is not entitled to be heard upon an application for a modification of the decree of divorce, affirmed by the supreme court, as a defense to a writ of *habeas corpus* to enforce compliance with the order.

Appeal from an order of the superior court for King county, French, J., entered October 16, 1917, in favor of the petitioner for a writ of *habeas corpus*, upon a hearing before the court. Affirmed.

Peterson & Macbride, for appellants.

Gay & Griffin, for respondent.

MOUNT, J.—This appeal is from an order of the lower court granting a writ of *habeas corpus* to the respondent for the possession of a minor child, and denying to the appellants the right to modify a decree of divorce.

The admitted facts are substantially as follows: In April, 1909, a decree was entered in the superior court for King county granting to Irene Beers a divorce from her husband, Fred E. Beers. The decree awarded the custody of the two minor children, Evelyn and Gladys Beers, to their mother. Afterwards, in the year 1912, Fred E. Beers filed a petition to modify the decree as to the custody of the children. Upon a hearing of this petition, the court granted the modification and awarded the custody of one of the children, Gladys Beers, to her father. Upon appeal to this court, that order of modification was affirmed. *Beers v. Beers*, 74

¹Reported in 172 Pac. 861.

Wash. 458, 133 Pac. 605. Prior to the affirmance of that order, Mrs. Beers took the child and was out of the state. She afterwards was married to a man by the name of Frallicciardi, and she has practically retained the custody of the child ever since and has not complied with the order of the court awarding the custody of the child to its father. In July, 1917, when the child was brought back to King county, in this state, Fred E. Beers, its father, filed a petition for a writ of *habeas corpus*, basing his right to the child upon the decree affirmed by this court in *Beers v. Beers, supra*. Upon the day after this petition was filed, Mrs. Frallicciardi filed a petition in the original action for a modification of the decree, praying to be allowed to have the custody of the child, and in her answer to the application for writ of *habeas corpus*, alleged, in substance, that conditions had changed since the last modification of the decree, that the father had never supported the child, had not paid the alimony, and was not in a position to give the child proper care, training and education, and that she was in a position to care for the child and that its best interest demanded that it should remain with her. The child at that time was at the age of eleven years. When the petition in *habeas corpus* came on to be heard before the court, it was agreed that the petition to modify the decree should be taken up with the petition for *habeas corpus*. The trial court was of the opinion that the father was entitled to the care and custody of the child under the modified decree, and refused to consider the application for modification, apparently because the order modifying the original decree had been affirmed by this court and no permission had been obtained from this court to modify it. The trial court, therefore, granted the petition for *habeas corpus*, and this appeal followed.

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The only question presented by the appellants is that the court erred in refusing to modify the decree because no permission had been obtained from this court therefor. We deem it unnecessary to enter into a discussion of that question at this time. It clearly appears from the record before us that Mrs. Beers, now Mrs. Frallicciardi, has retained possession of the child ever since the modification in 1916, has kept the child out of the jurisdiction of the court most of that time, and has failed and refused to comply with the order of modification. We are satisfied that, under those circumstances, she was not entitled to be heard upon her petition for modification as a defense to the writ of *habeas corpus*. The writ of *habeas corpus* was sued out to enforce the order of modification made in the year 1916, awarding the custody of this child to its father. He was clearly entitled to that relief. When it is shown that Mrs. Frallicciardi has continuously violated the order and has kept the child away from the jurisdiction of the court, she ought not to be heard to say, in answer to a petition for *habeas corpus*, that she is now a fit and proper person to have the care of the child, especially where she has designedly avoided the jurisdiction of the court. We are of the opinion, therefore, that the court arrived at a correct conclusion, even though permission of this court was not necessary to a modification of the modified order.

“The question before us is not whether the lower court arrived at a correct conclusion by an incorrect process of reasoning, but whether, considering all the evidence, its decision was the proper one to be entered. . . .” *Kane v. Dawson*, 52 Wash. 411, 100 Pac. 837.

The order appealed from is therefore affirmed.

ELLIS, C. J., CHADWICK, and HOLCOMB, JJ., concur.

[No. 14591. Department Two. April 29, 1918.]

NORTHERN PACIFIC RAILWAY COMPANY, *Respondent*, v.
SNOHOMISH COUNTY, *Appellant*.¹

JUDGMENT—RES JUDICATA—IDENTITY OF PARTIES. A judgment in mandamus at the suit of the mayor of a city compelling a county tax assessor to extend a tax levy upon the county rolls, is not *res judicata* or a bar to an action by a taxpayer to cancel taxes against his property based upon the levy; since the parties are not the same, either actually, or potentially as a member of a class.

COURTS—RULE OF DECISION—STARE DECISIS. A writ of mandate compelling a county assessor to extend a tax levy upon the county rolls is not controlling under the rule of *stare decisis*, in a taxpayer's suit contesting the tax, where there was no general acquiescence of long standing by taxpayers nor any vested rights acquired under the former judgment.

MUNICIPAL CORPORATIONS—TAX LEVIES—VALIDATION—STATUTES—CONSTRUCTION. Rem. Code, § 5140-4, validating 1913 and 1914 tax levies by cities of the third class made in excess of limitations by statute, with the proviso that the act shall not apply to such cities as "did not attempt to collect such levies, or which cancelled the same," validates all excess levies mentioned except in cities where no taxpayer had paid the excess tax at the time of the passage of the validating act; this construction of "attempt to collect," when cities have no power to make the collection or to cancel the tax, being necessary to avoid an obvious absurdity.

SAME. In such a case, a mandamus suit to enforce a levy would not be within the proviso as an "attempt to collect," when the suit was not brought until after the passage of the validating act.

HOLCOMB, J., dissents.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered September 29, 1917, in favor of the plaintiff, after a trial to the court upon an agreed statement of facts, in an action to cancel a tax. Affirmed.

John Sandidge, Lloyd L. Black, and E. W. Klein,
for appellant.

Geo. T. Reid, J. W. Quick, L. B. da Ponte, and C. A. Murray,
for respondent.

¹Reported in 172 Pac. 878.

ELLIS, C. J.—Plaintiff brought this action to cancel and strike from the tax rolls of Snohomish county certain taxes against its property based upon the levy for city purposes by the city of Snohomish, a city of the third class, for the year 1913, and extended upon the county tax rolls for the year 1916.

The agreed facts are as follows: The city made a levy for the year 1913 of 19.25 mills for all city purposes. That levy was certified for extension on the tax rolls of Snohomish county, but at the suit of a taxpayer against the county assessor, the extension as to all of the levy in excess of 4.8 mills was, by the superior court, enjoined as illegal and excessive. On appeal to this court the decree of injunction was affirmed. *Whitfield v. Davies*, 78 Wash. 256, 138 Pac. 883. Thereafter the levy to the extent of the 4.8 mills which was not enjoined was extended upon the county tax rolls for the year 1913, and the resulting tax as against the property of the plaintiff herein was paid. No attempt was then or thereafter made by the city or county of Snohomish to extend or collect the 14.45 mills which had been so adjudged excessive and illegal, until after the passage by the legislature of 1915 of chapter 176, Laws of 1915, p. 587, entitled: "An act relating to the validation of certain tax levies in cities of the third class, and providing for their collection."

Subsequent to the passage of the act of 1915, in an action styled *State ex rel. Watson v. Davies*, a writ of mandate was issued from the superior court for Snohomish county directing the assessor to extend upon the county rolls for the year 1916 the excessive 14.45 mills of the 1913 levy. The extension was accordingly made upon the basis of the 1913 valuation, hence this suit.

Upon these facts, the trial court in this action entered a decree cancelling the tax levy as against plaintiff's property. The county appeals.

Appellant contends (1) that the decree in *State ex rel. Watson v. Davies* is *res judicata* in this case, or, in any event, should be followed on the principle of *stare decisis*; and (2) that the trial court placed an erroneous construction upon chapter 176, Laws of 1915, p. 587, § 1 (Rem. Code, § 5140-4). We shall consider these in the order stated.

I. Is the mandate issued in the suit of the mayor of the city against the assessor of the county a bar to this action? We think not. To make a judgment *res judicata* in a subsequent action there must be a concurrence of identity in four respects: (1) of subject-matter; (2) of cause of action; (3) of persons and parties; and (4) in the quality of the persons for or against whom the claim is made. 1 Freeman, Judgments (4th ed.), § 252; 3 Bouvier's Law Dictionary (Rawles' 3d Rev.), p. 2910; *Atchison, T. & S. F. R. Co. v. Commissioners of Jefferson County*, 12 Kan. 127; *Turner Township v. Williams*, 17 S. D. 548, 97 N. W. 842. Manifestly there is no such concurrence of identity in these two suits. It may be conceded that the subject-matter is the same and, in a broad sense, that the causes of action are identical, but there the identity vanishes. The parties are not the same, either actually or by privity. Neither the plaintiff nor the defendant in the other action appeared in the same quality or capacity as does the plaintiff in this action. The mayor's action was not in his personal quality or capacity as a taxpayer on his own behalf and on behalf of others similarly situated, nor did the county assessor defend in the capacity of a taxpayer. The mayor did not sue, nor the assessor defend, as a member of a class for himself and others of the same class, as, for instance,

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in the case of a stockholder's action. Respondent was not a party to the other action, either actually, or potentially by representation as a member of a class. On the contrary, respondent's interest was, and is, adverse to that of both parties to the other action in the capacity in which they there appeared. In fact, that whole proceeding was in its purpose adverse to respondent's interest. Respondent had no day in court in that action. The judgment there is not a bar to its action here.

"Of course, to say that a decree rendered *pro confesso* in an action between two parties, both of whose interests are adverse to the plaintiff's, concludes this plaintiff, and bars its rights, is absurd." *Atchison, T. & S. F. R. Co. v. Commissioners of Jefferson County, supra*.

The rule announced in *Stallcup v. Tacoma*, 13 Wash. 141, 42 Pac. 541, 52 Am. St. 25, relied upon by appellant, has no application to the facts here. The other case cited by appellant in this connection, *Waldron v. Snohomish*, 41 Wash. 566, 83 Pac. 1106, is even less apposite. It rested upon specific statutory provisions governing reassessments for local improvements. The general doctrine of *res judicata* was not involved.

The claim that the decision in the suit of the mayor against the county assessor, which was not appealed from, should be adhered to under the doctrine of *stare decisis* is untenable. That doctrine is invoked to preserve rules of law established by decisions of long standing, usually of courts of last resort. There is no evidence in this case that there has been any general acquiescence by the taxpayers affected in the judgment entered in the mayor's action, nor that any vested rights have been acquired thereunder.

II. Did the trial court place an erroneous construction on chapter 176 of the Laws of 1915, p. 587? We think not. That act, omitting title, reads as follows:

"Section 1. The tax levies made by cities of the third class for the years 1913, 1914 and prior years are hereby ratified and validated wherever the only reason of the invalidity of such tax levy or levies is that the same were made in excess of the limitation prescribed by statute, or were not apportioned according to the provisions of chapter 108, Laws of 1913; and upon the taking effect of this act, the proper officers are hereby authorized and directed to proceed with the extension, collection and enforcement of the lien of such taxes; and collections heretofore made are hereby ratified: Provided, This act shall not apply to such cities as did not attempt to collect such levies or which cancelled the same." Rem. Code, § 5140-4.

It was sustained by this court as constitutional in *Owings v. Olympia*, 88 Wash. 289, 152 Pac. 1019. Appellant relies upon the body of the act as validating the excess levy of 1913 as extended on the rolls for 1916. Respondent relies upon the proviso as excluding that excess from the purview of the act. The meaning of the body of the act is expressed with reasonable certainty, but it would be difficult to achieve a greater inaccuracy in terms in the same number of words than that presented in the proviso. In the first place, a *levy* is neither collected nor collectible until it is merged into a tax in specific sums against specific properties by the action of the county commissioners. Accurately speaking, cities do not make levies, but merely estimates to guide the commissioners in levying taxes for city purposes. *State v. Snohomish County*, 71 Wash. 320, 128 Pac. 667. In the second place, cities in this state cannot *collect* taxes, much less incipient levies, and presumably never *attempt* to do so. The collection of taxes is by statute imposed upon the county authorities. In the third place, cities do not *cancel* tax levies in any literal sense. We shall assume that the city might effectively repeal or amend the ordinance making the incipient levy or estimate for city purposes at

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any time before the expiration of the period for certification to the county officials for extension on the tax rolls, but in this case such a course would have been an idle formality. That period had passed before the decision of the superior court enjoining the extension of the levy as a tax, which decision was affirmed in the case of *Whitfield v. Davies, supra*. That decision effectually cancelled the incipient levy in the only manner in which it then could be cancelled. It annulled it.

Literally construed, it is obvious that the proviso cannot apply to any city or any levy or any tax. But the legislature must have meant something by this proviso. It is our duty, within the bounds of reason, to give it some meaning rather than none. Let us, therefore, assume that the word "collect" was not used in a literal sense, but in a broad sense embracing the whole process or system by which cities of the third class through the county machinery raise revenue by taxation. Giving the word collect this broad significance, appellant contends that the city of Snohomish, by making the initial levy and by certifying it for extension on the county rolls, did all that it legally could do towards a collection and only failed because of the injunction in the *Whitfield* case, and, therefore, these things must be held an "attempt to collect" by the city within the meaning of the proviso. But so to construe those proceedings makes the proviso, when read with the body of the act, absurd because meaningless. The act deals with excess levies and nothing else. It validates them and authorizes their extension on the rolls and the collection of the resulting tax. It ratifies collections theretofore made. It is self-evident that where there is no excess levy there is nothing to validate, nothing needing an authorization to extend or collect, nothing to ratify, in short nothing to which either the act or the proviso can apply. If, therefore, the very

proceedings, the excess levy and certification for extension of that excess, which alone can create or occasion the subject-matter of the body of the act are to be construed as an "attempt to collect" within the proviso, then the act with the first clause of the proviso means just what it would mean without it. The first clause of the proviso would add nothing, except nothing, provide nothing, and the legislature would stand convicted of a deliberate absurdity.

To avoid this absurdity and give any meaning to the first clause of the proviso, the words "attempt to collect" must mean at least a partially successful attempt to do the final act of raising the excess revenue, namely, the procuring of the money from the taxpayers by the county treasurer for the city. In cities where the attempt had been wholly successful and all of the excess taxes had been paid, the ratification of collections met the whole purpose of the act. But in those cities where the illegal excess tax had not been aborted, either by abandonment or court decree, before it reached the final stage of collection, and there had been an attempt to collect, partially but not wholly successful, something more than ratification was necessary to complete the collection. The tax must be validated and collection authorized in addition to the ratification of collections already made. These things are supplied by the other parts of the act, which but for the proviso would apply to all cities which had made and certified excess levies, whether any part of the excess had been collected or not. But the proviso, as we must construe it, limits the application of those provisions by declaring that they shall not apply to cities the excess levies of which there had been no attempt to consummate the final act of collection. This view was well expressed by the trial court as follows:

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“Chapter 176 means that all the excess levies mentioned in it are validated, their collection authorized and directed, and any collections on account of such made prior to the taking effect of Chapter 176 in June, 1915, ratified except where for any reason whatsoever, be it the decree of injunction in the case of the City of Snohomish (*Whitfield v. Davies, supra*) or some voluntary action, regularly or irregularly taken in some other of the third class cities of the state, no payment of any of the excess levy has been made by a taxpayer.”

This view is further justified by the fact that it leads to equality of taxation of all persons in third-class cities similarly situated. In every city of the third class where there was an excess levy and no taxpayer of such city had paid the excess tax at the time of the passage of the validating act, no taxpayer should be compelled to pay, as there was an equality of burden without such payment, hence the proviso, as we construe it, that the act should not apply to such city. But in any city where any of the taxpayers had paid the excess tax, the act creates an equality by making it incumbent on all other taxpayers of such city to pay it. Looking to the prior law, the mischief and the remedy, this must have been the purpose in the legislative mind in passing the proviso.

The suggestion that the mandamus action of the mayor against the county assessor was an attempt by the city to collect the tax is answered by the fact that, even so considered, it came too late. It was long after the passage of the validating act, while the proviso in terms relates to attempts to collect prior to that time.

We hold that, on the agreed facts before us, neither the city of Snohomish, nor the county treasurer for it, had attempted to collect the excess tax within the meaning of the proviso, but that the excess tax levy had been cancelled and annulled by the decree in *Whitfield v. Davies, supra*, in the only way in which it could

be cancelled after the time for certification for extension on the rolls had expired, namely, by the judgment of a court. Construing the proviso in the only way which gives it any force, the tax here falls within both the contingencies contemplated by the proviso as excepting it from the validating effect of the body of the act.

The judgment is affirmed.

MOUNT, FULLERTON, and CHADWICK, JJ., concur.

HOLCOMB, J. (dissenting).—In my opinion, the proviso in question is uncertain, meaningless, or repugnant to the purview of the body of the act, if given any meaning and effect, and should be declared void. I therefore dissent.

[No. 14302. Department One. April 30, 1918.]

In the Matter of the Guardianship of the Estate of
MARTHA E. BAYER.¹

INSANE PERSONS—GUARDIANSHIP—INCOMPETENCY—EVIDENCE—SUFFICIENCY. It is not necessary that a person be insane or an idiot, in order to authorize the appointment of a guardian because of incompetency to manage business affairs; and it is error to deny an appointment, where it appears that a widow, possessed of considerable means, had been taken care of in several private sanitariums on account of mental incompetency, and had been committed to and paroled from the state asylum for the insane, had sold a farm worth \$45,000 to \$50,000 for less than half its value, and acted irrationally and suffered from delusions; since an improvident business transaction should be taken into consideration along with other evidence.

Appeal from a judgment of the superior court for Lincoln county, Sessions, J., entered March 20, 1917, denying the appointment of a guardian for an incompetent person, tried to the court. Reversed.

¹Reported in 172 Pac. 842.

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Samuel P. Weaver, for appellant.

Merritt, Lantry & Merritt (Clarence B. Willey, of counsel), for respondent.

MAIN, J.—The petitioner, John Dotson, brought this action for the purpose of having a guardian appointed for the estate of his sister, Martha E. Bayer, claiming that Mrs. Bayer was incompetent to manage her own affairs. The cause was tried to the court without a jury, and resulted in a judgment denying the guardianship. From this judgment, the petitioner appeals.

The estate for which the guardianship was sought was a farm consisting of 960 acres of land in Lincoln county, this state. At the time of the trial of the action, Mrs. Bayer was approximately sixty-six years of age.

The question to be determined upon this appeal is not whether Mrs. Bayer was insane, but whether she was incapable of managing her business affairs by reason of mental unsoundness. It is not necessary that a person be an idiot or a lunatic in the strict sense of those terms before a guardian of the estate can be appointed. *In re Wetmore's Guardianship*, 6 Wash. 271, 33 Pac. 615; *In re Ervay*, 64 Wash. 138, 116 Pac. 591; *Shafer v. Shafer*, 181 Ind. 244, 104 N. E. 507.

The rule which is generally supported by the authorities is stated in 22 Cyc., page 1139, as follows:

“Generally speaking the test of whether a guardian should be appointed for the estate of a person is whether mental unsoundness exists to such a degree that he is incapable of conducting the ordinary affairs of life, so that to leave his property in his possession and control would render him liable to become the victim of his own folly or of the fraud of others. It is not necessary in most states that the person should be an idiot or a lunatic in the strict sense of those terms; . . .”

In some states, however, the rule is otherwise. With the law as thus stated, over which we think there is no

serious controversy, the question then to be determined is whether the evidence in this case shows that Mrs. Bayer was suffering from mental unsoundness to such a degree that she was incapable of conducting her business affairs.

In the spring or early summer of 1907, Mrs. Bayer, who was then living with her husband at their home in the northern part of the city of Seattle, was placed in a sanitarium at Portland, Oregon, for treatment for mental trouble. She returned in the fall of that year to her home, from which she was taken thereafter to another private sanitarium for the same trouble. While she was in this institution her husband, Dr. Bayer, died, and in December, 1908, a brother of hers, Jasper Dotson, was appointed her guardian. In April, 1910, the guardian caused Mrs. Bayer to be placed in the Puget Sound Sanitarium in Seattle for treatment on account of mental trouble or disease. About a year later, she was removed by the guardian to another sanitarium, where she remained for a period of about three months. In September, 1912, Mrs. Bayer was placed in the state institution for the insane at Steilacoom. About a month later, a sister, Mrs. Emmaretta McClanahan, instituted proceedings to have her released therefrom, and as a result of such proceedings, Mrs. Bayer was paroled and placed in the care of Mrs. McClanahan.

About the month of February, 1916, Mrs. Bayer went to Carter, Wyoming, where her condition and conduct were such that she was taken into custody by the sheriff, because it was thought by those who observed her condition that she was not able to take care of herself. After taking her into custody, the sheriff telegraphed a brother, Emanuel Dotson, at Belden, Nebraska, that his sister "was incompetent and has got to be taken care of." A telegram of like import

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was sent to Mr. D. R. Cole, who, subsequent to the discharge of Mrs. Bayer from the asylum at Steilacoom, had been managing her farm under a power of attorney. Mr. Cole remitted money with which a ticket was purchased for Mrs. Bayer to go to her brother in Nebraska. There were two other brothers. One lived in the state of Oregon and the other at Cashmere, this state. After being with the brother in Nebraska for a few months, she sold and conveyed to him the Lincoln county farm with the crop thereon, which was worth between \$45,000 and \$50,000, for \$3,000 cash, a note for \$10,000, with interest at the rate of 5 per cent per annum, unsecured, and the assumption of a \$7,000 mortgage which was then upon the farm. In other words, she sold the property for less than one-half of its value. The brother testified that he purchased it because his sister wanted to sell it, and "because it was a good buy." Subsequent to the time when Dr. Bayer died and up to the time when Mrs. Bayer went to Nebraska, when not confined in any institution for mental treatment, she lived at various places—a portion of the time with Mrs. McClanahan, another portion with the brother in Oregon, and also with the brother in Washington, and a nephew, who was operating the farm under a lease from her attorney in fact. She also spent some time in the state of California, as well as in Nevada. While at her brother's home in the state of Oregon, she refused to live in the house with the family, but lived in a little house that stood in the same yard. She refused to eat at the table with the family, but had her meals brought out to her, and then would not eat when any one was watching her. She would stay in bed with her clothes on, and often would not answer when spoken to. She would not take care of her room, bed or fire. While staying at the other places mentioned, the same peculiarities, and others,

characterized her conduct. She suffered a delusion that her husband was still alive. She would go out by the side of the street and play in the dirt. The evidence shows that, as a young woman, Mrs. Bayer was neat and careful of her dress and appearance, and that, since the death of her husband, she has become untidy and almost slovenly. The record not only contains the above facts, but much more of like import.

Upon the trial, Mrs. Bayer testified in her own behalf and sought to explain many of the things already referred to. She apparently, as a witness, seemed reasonably bright and competent. The expert alienists who testified on the respective sides of the case, as is not uncommon in such cases, expressed different views as to competency. The trial court, in denying the application for guardianship, seems to place considerable reliance upon the testimony of Mrs. Bayer and her appearance upon the witness stand, but the fact that she seemed a bright witness would not necessarily establish her competency to manage her business affairs. A child of immature years, incompetent, both in fact and in law, to conduct business affairs, may make the brightest of witnesses. Upon the trial in which Mrs. Bayer was released from the asylum for the insane, she also testified and, as the evidence shows, made a bright witness, but her condition thereafter was not different from what it had been prior to that time. So far as this record shows, the only business transaction that Mrs. Bayer ever had of any importance was the sale of the farm to her brother. As already pointed out, this was such a transaction as would not tend to support her business competency. It is not claimed, either by her or by her brother, who was the beneficiary of the transaction, that it was intended to be anything else than a pure business transaction. An improvident business transaction may be competent evidence in

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support of an application for a guardianship, and should be taken into consideration, in connection with all the other evidence in the case, in determining the question of mental incompetency. *Shelby v. Farve*, 33 Okl. 651, 126 Pac. 764; *In re Chappel's Estate*, 189 Mich. 526, 155 N. W. 569.

In the case last cited it was said:

"An improvident business transaction may be competent evidence in support of an application for guardianship; most of the acts of a respondent in such a case are competent as going to show the mental condition. But such an improvident act becomes cogent proof of mental incompetency only as it is reinforced and explained by other facts and circumstances."

Without further reviewing the evidence it may be said that, after giving this record the most careful consideration, we are entirely convinced that the great weight of the evidence is to the effect that Mrs. Bayer was not competent to manage her business affairs, and that therefore the trial court erred in failing to appoint a guardian for her estate.

The judgment will be reversed, and the cause remanded with direction to the superior court to cause letters of guardianship to be issued.

ELLIS, C. J., FULLERTON, PARKER, and WEBSTER, JJ., concur.

[No. 14456. Department One. April 16, 1918.]

SPOKANE TAXICAB COMPANY, *Appellant*, v. JOHN B. WHITE, *as*
Prosecuting Attorney for Spokane County, et al.,
*Respondents.*¹

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered January 6, 1917, upon findings in favor of the defendants, in an action for an injunction. Affirmed.

McCarthy & Edge, for appellant.

John B. White and *W. C. Meyer*, for respondents.

PER CURIAM.—The question presented in this case has just been considered and decided in *Cushing v. White*, *ante* p. 172, 172 Pac. 229. Upon the authority of that case the judgment is affirmed.

[No. 14552. Department One. April 23, 1918.]

JOHN J. SCHULLER, *Respondent*, v. ANGELA SCHULLER, *Appellant.*²

Appeal from a judgment of the superior court for Yakima county, Grady, J., entered December 12, 1916, in favor of the plaintiff, in an action for an accounting, tried to the court. Affirmed.

Parker, LaBerge & Parker, for appellant.

Roberts & Udell, for respondent.

PER CURIAM.—On November 20, 1911, respondent assigned to appellant a certain mortgage to secure the payment of an indebtedness owing by respondent to appellant, and this action was brought for an accounting of moneys received by virtue of the assignment, which resulted in a decree in favor of respondent for the sum of \$879.63, from which this appeal is prosecuted.

The record presents an unfortunate controversy between mother and son, the transactions involved being numerous and extending over a period of several years. We have carefully examined the evidence and are convinced that the decree of the lower court, under all the facts and circumstances of the case, is just and equitable. Issues of fact only are presented, and no purpose would be served by descending to a discussion of details. The decree is correct and will be affirmed.

¹Reported in 172 Pac. 233.

²Reported in 171 Pac. 741.

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Opinion Per HOLCOMB, J.

[No. 14506. Department Two. April 27, 1918.]

BERTHA FELDMAN, Respondent, v. SAMUEL L. FELDMAN, Appellant.¹

Appeal from a judgment of the superior court for Whatcom county, Hardin, J., entered February 24, 1917, upon findings in favor of the plaintiff, in an action for divorce, tried to the court. Affirmed.

Eimon L. Wientz, for appellant.

S. M. Bruce, for respondent.

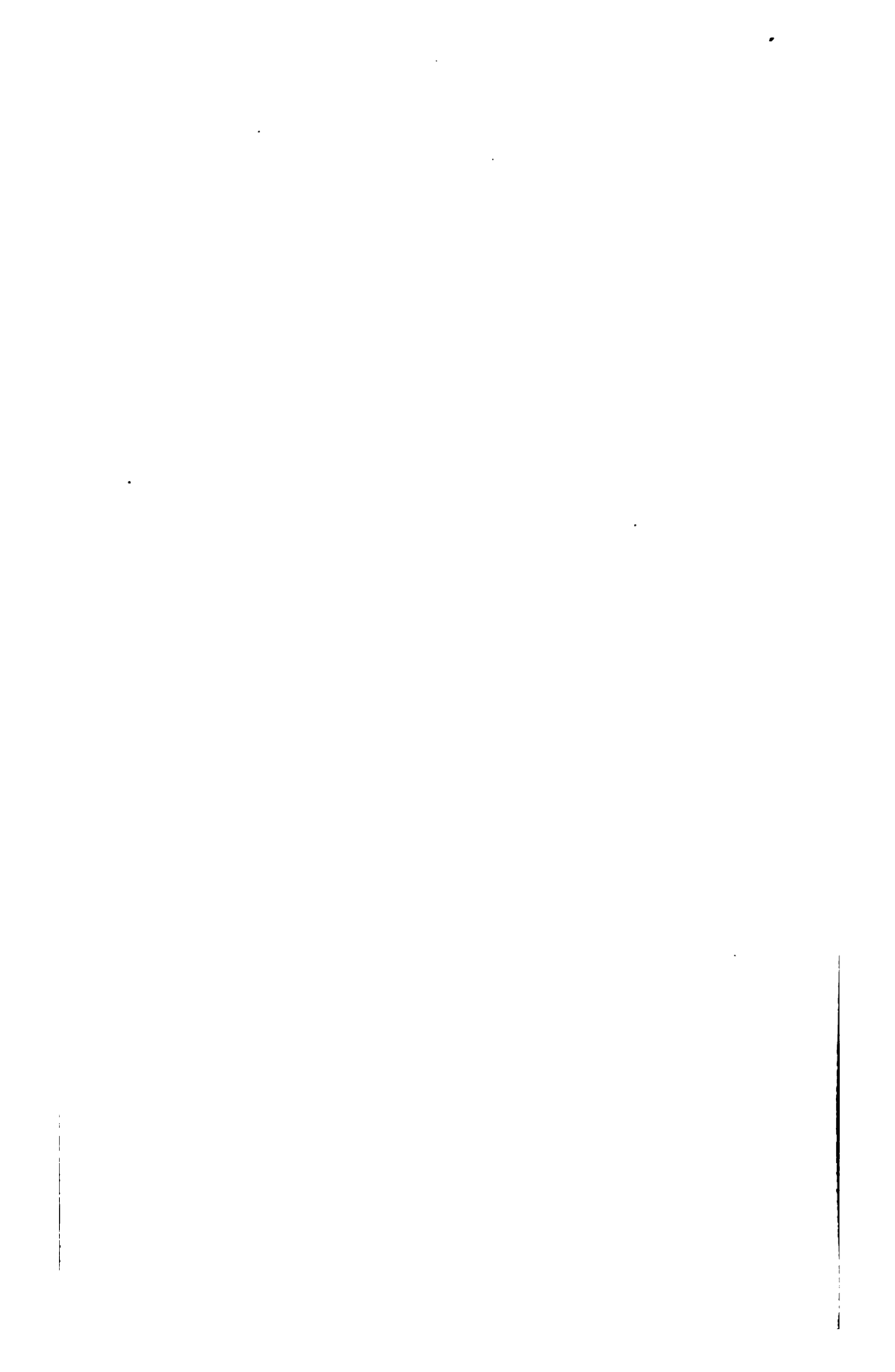
HOLCOMB, J.—The statement of facts on appeal having been stricken on motion, all claims of error by appellant are eliminated save those as to the conclusions of the court to the effect that respondent should have judgment dissolving the marriage, that she be awarded one-half the lands of the parties, and the decree to the same effect, and providing alternatively that appellant should pay to respondent \$2,000 in lieu of her rights in and to the property set apart to appellant, with a lien therefor upon the property.

The complaint states a cause of action for divorce for cruelty and abuse. The court found the allegations true, setting out specific conduct constituting cruelty and abuse. Such being the finding and the record not being before us, we are bound by it. The conclusions and decree therefore necessarily followed.

Affirmed.

ELLIS, C. J., MOUNT, FULLERTON, and CHADWICK, JJ., concur.

¹Reported in 172 Pac. 884.



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VII. REQUISITES FOR TRANSFER OF CAUSE.

1. **APPEAL—BOND—TIME FOR FILING.** Under Rem. Code, § 1721, providing that an appeal shall be ineffectual unless at or before the time of giving notice or five days thereafter, an appeal bond shall be filed, an appeal bond filed 83 days before the giving of notice is sufficient. *Singer v. Metz Co.*..... 67
2. **APPEAL — BOND — OBLIGEEES — ASSIGNEE OF JUDGMENT.** Under Rem. Code, § 193, providing that "no action shall abate by . . . the transfer of any interest therein," and allowing substitution, it is not essential to serve notice of appeal upon an assignee of a judgment, or that he be named in the bond an appeal, where he had not been substituted as a party to the action; since he was not the "prevailing" party, and his rights as an assignee are in no manner affected by the failure to name him in the bond. *Wright v. Seattle Grocery Co.*..... 266
3. **SAME—NOTICE—PARTIES TO BE SERVED—SURETIES ON COST BOND—WAIVER.** Failure to serve notice of appeal upon the sureties upon respondent's cost bond is not ground for dismissal of the appeal, where the appellant files a waiver of any claim against the cost bond and the sureties thereon. *Armstrong v. Spokane International R. Co.*..... 525

X. RECORD.

4. **APPEAL—RECORD—EXCEPTIONS—STATEMENT OF FACTS.** In the absence of exceptions to the findings of fact, or any statement of facts, an appeal in which there is no question raised which is determinable apart from the facts will be dismissed and the judgment will be affirmed. *Hatch v. Hover-Schiffner Co.*..... 551
5. **APPEAL—REVIEW—RECORD.** Error cannot be predicated upon requiring the plaintiff to make an election where neither the pleadings nor the ruling complained of are brought up in the record. *Green v. Bouton.*..... 454
6. **APPEAL — RECORD — AFFIDAVITS — STATEMENT OF FACTS.** Affidavits used upon application for suit money and alimony cannot be considered on appeal, unless brought up by bill of exceptions or statement of facts. *Hendrix v. Hendrix.*..... 535
7. **APPEAL—RECORD—EXHIBITS—REVIEW.** Error cannot be predicated upon insufficiency of the evidence to sustain the verdict, where

Appeal and Error—Continued.

- neither the instructions nor numerous exhibits introduced in evidence are made a part of the record on appeal. *Easley v. Elmer* 408
8. SAME—ABSTRACT—AMENDMENT—DISMISSAL. Under Rem. Code, § 1730-6, giving appellant an opportunity to amend or supplement the abstract if deficient, failure of the abstract to conform to court rules is not ground for dismissing the appeal in the first instance. *Singer v. Metz Co.*..... 67
 9. SAME—ABSTRACT—SUFFICIENCY. An abstract will not be struck out for defects that are amendable such as omissions in the title page; and it is not necessary to set out the pleadings or evidence in full. *Singer v. Metz Co.*..... 67
 10. APPEAL—RECORD—STATEMENT OF FACTS—CERTIFICATION—ALL THE MATERIAL FACTS. A judge cannot be compelled to certify a statement of facts as containing all the material facts, when such is not the case, although no amendments were proposed, under Rem. Code, § 389, providing that if no amendments are proposed the statement shall be deemed agreed to; in view of Id., § 391, requiring the judge to certify that a statement contains all the material facts "when such is the fact." *State ex rel. Snook v. Jurey*..... 1
 11. SAME—STATEMENT OF FACTS—SUFFICIENCY—RIGHT TO AMEND. The trial judge is not justified in striking out, in effect, a proposed statement of facts by refusing to certify it without allowing an opportunity for amendment, where it was not made in bad faith and included considerable detail covering 70 typewritten pages, although it did not contain all the evidence material to the issue involved in the appeal. *State ex rel. Snook v. Jurey*..... 1
 12. APPEAL—DISMISSAL—DELAY IN FILING RECORD. An appeal will not be dismissed for failure to file the record within the time provided by law when the fault was due to the custom of allowing the transcript to remain in the office of the clerk of the court for the use of the adverse party, and to the oversight of the clerk in failing to forward it in time, and the delay was minimized by advancing the cause on the docket of the supreme court. *Armstrong v. Spokane International R. Co.*..... 525
 13. APPEAL—STATEMENT OF FACTS—TIME FOR FILING—EXTENSION. An *ex parte* order extending the time for filing a statement of facts is void. *Siegley v. Nakata*..... 73
 14. SAME—STATEMENT OF FACTS—NOTICE OF EXTENSION OF TIME. Rem. Code, § 393, requiring notice of an application for an extension of time for filing a statement of facts requires "written" notice, and oral notice and stipulation that no objection would be filed does not work an estoppel. *Siegley v. Nakata*..... 73

Appeal and Error—Continued.**XI. BRIEFS.**

15. **APPEAL—BRIEFS—ASSIGNMENT OF ERROR.** In the absence of an assignment of error in the brief, error cannot be based upon exceptions to the exclusion of evidence. *Price v. Hornburg*..... 472

XVI. REVIEW.

Review in criminal prosecutions, see **CRIMINAL LAW**, 8-15.

Review of hearing upon contest over street railway rates, see **STREET RAILROADS**, 2.

16. **APPEAL—REVIEW—THEORY OF CASE.** Where plaintiff's action was based upon defendant's failure to fence its track and the driving of plaintiff's horse upon a bridge where it was killed by a moving train, which was wholly unsupported by evidence, the theory cannot be changed on appeal to a claim of liability for injury to the horse in falling through the bridge. *Thayer v. Snohomish Logging Co.*... 458
17. **APPEAL—REVIEW—INVITED ERROR.** Error cannot be assigned on the failure to strike out evidence as to transactions had with a party since deceased which was all brought out in direct response to questions propounded by counsel for appellant. *Hoffman v. Gottstein Investment Co.*..... 428
18. **APPEAL—REVIEW—INVITED ERROR.** Improper argument to the jury respecting a compromise or settlement is not ground for a reversal, where the same was offered in answer to an equally improper utterance of opposing counsel on the subject of compromising the claim. *Rust v. Washington Tool & Hardware Co.*..... 552
19. **APPEAL—REVIEW—PRESUMPTIONS—COSTS—WITNESS FEES.** Where there is nothing in the record to show that witnesses before a referee did not report their attendance each day, it will be assumed on appeal that the witnesses who appeared and were examined were entitled to compensation as witnesses. *Hopkins v. Craib*..... 309
20. **APPEAL—REVIEW—DISCRETION—MOTION TO DISMISS.** The denial of a motion to dismiss for want of prosecution, will not be disturbed on appeal except for abuse of discretion. *National Surety Co. v. American Savings Bank & Trust Co.*..... 213
21. **APPEAL—REVIEW—VERDICT.** Where the evidence was conflicting and the case was submitted on proper instructions, error cannot be predicated on the insufficiency of the evidence. *Singer v. Metz Co.* 67
22. **APPEAL—REVIEW—FINDINGS.** Where the facts in an action tried to the court rest entirely upon oral evidence of witnesses testifying before the court, great weight is given the conclusions of the trial judge, and the findings will not be disturbed unless the evidence clearly preponderates against them. *Miller v. Reeves*..... 642

Appeal and Error—Continued.

23. **APPEAL—REVIEW—FINDINGS.** On a trial *de novo* on appeal, the supreme court must examine the evidence and determine what findings should have been made, disregarding testimony erroneously admitted. *Rubens v. Rubens*..... 675
24. **APPEAL—HARMLESS ERROR—EVIDENCE.** It is not prejudicial to reject evidence of a memorandum which was incompetent if it had been admitted over objection. *Kennedy v. Burr*..... 61
25. **APPEAL—REVIEW—HARMLESS ERROR—EXCLUSION OF EVIDENCE.** Error cannot be predicated upon excluding testimony tending to show that a tester board was not in itself a dangerous instrumentality, where the court by its instructions eliminated that question and submitted the case only upon the question of failure or inadequacy of supervision. *Bruenn v. North Yakima School District No. 7*..... 374
26. **APPEAL—REVIEW—CURE OF ERROR—EVIDENCE—INSTRUCTIONS.** In an action for personal injuries, error in admitting evidence of special damages from loss of earning power in plaintiff's business which was not specially alleged, is not cured by instructions to the jury on the measure of damages, limiting plaintiff's recovery to the amount which the jury find will "fairly and honestly compensate him for the personal injuries he himself sustained, if any"; since it did not specify the items of damages to be eliminated nor exclude the objectionable evidence from the jury's consideration. *Armstrong v. Spokane International R. Co.*..... 525

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

27. **APPEAL—REVERSAL—EXTENSION OF TIME.** Where the lower court erroneously cancelled a contract for the sale of timber before the expiration of the five years limited for its removal, upon reversal the appellant will be given an extension of time for performance amounting to the difference between the date of the judgment and the date of the expiration of the contract. *Colvin v. Clark*..... 100
28. **APPEAL—DECISION—EX PARTE ORDERS—REMAND FOR FURTHER PROCEEDINGS.** Upon reversing void orders allowing compensation to a receiver and his attorneys because made *ex parte*, the supreme court cannot determine the merits, but must remand the case for a hearing upon notice to the parties interested. *Colkett v. Hammond*.. 416

Appearance:

1. **APPEARANCE—GENERAL OR SPECIAL—ANSWER TO MERITS.** An answer on the merits praying for a dismissal and costs, is general, although it attempted to preserve a special appearance made on motion to quash service of process after overruling the motion; in view of Rem. Code, § 241, providing that every appearance is a general ap-

Appearance—Continued.

pearance, unless the defendant in making the same states that the same is a special appearance. *Matson v. Kennecott Mines Co.* . . . 12

Appliances:

Liability of employer for defects or failure to guard, see MASTER AND SERVANT, 11.

Application:

To withdraw plea of guilty, see CRIMINAL LAW, 2.

For new trial, see CRIMINAL LAW, 6.

For modification of divorce decree respecting custody of child, see HABEAS CORPUS.

For change of judge, time for, see JUDGES.

Appointment:

Of guardian, see INSANE PERSONS, 1.

Arson:

Instructions as to grade or degree of offense, see CRIMINAL LAW, 4.

Assignment of Errors:

In brief, see APPEAL AND ERROR, 15.

Assignments:

Assignee of judgment as party to be served with notice of appeal, see APPEAL AND ERROR, 2.

For benefit of creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS.

Of property held under replevin bond, see INDEMNITY, 1.

Of insurance policy after loss, see INSURANCE, 2.

By contractor of funds due from city, see MUNICIPAL CORPORATIONS, 1-3.

By receivers, see RECEIVERS, 1, 2.

1. **ASSIGNMENTS — PROPERTY ASSIGNABLE — RIGHTS UNDER INDEMNITY BOND.** The rights of a surety company under an indemnity bond given to secure application of the proceeds of a contract on which the surety company was liable, is assignable to the owners to whom the surety company was liable, notwithstanding the nonassignability of insurance contracts, in view of the purposes for which the bond was given and that the assignment did not change or affect the liability in any respect. *Island Gun Club v. National Surety Co.* . 185

Assignments for Benefit of Creditors:

See CHATTEL MORTGAGES, 2.

1. **ASSIGNMENTS FOR BENEFIT OF CREDITORS—PRIORITIES—UNRECORDED CHATTEL MORTGAGE.** An assignee for the benefit of creditors under a consummated assignment, who acquired possession of the property without knowledge of an unrecorded chattel mortgage, can

Assignments for Benefit of Creditors—Continued.

- assert priority over the mortgage the same as the creditors could have done under assignment directly to them. *Keyes v. Sabin*. . 618
2. SAME—TITLE ACQUIRED. A consummated assignment for the benefit of creditors under which the assignee takes possession prior to the recording of a prior mortgage creates more than a lien in favor of general creditors, who acquire ownership and at least equitable title. *Keyes v. Sabin*..... 618

Associations:

- Liability of charitable association for torts of employees, see CHARITIES.

Attestation:

- Of will, see WILLS, 1, 2.

Attorney and Client:

- Agency of attorney, knowledge of fraud imputed to principal, see FRAUDULENT CONVEYANCES, 3.

Authority:

- Of bank officers, see BANKS AND BANKING, 1.
- Of superior judge sitting as committing magistrate, see CRIMINAL LAW, 1.
- Of county commissioners in establishing highway, see HIGHWAYS, 1, 2.
- Of agent, see PRINCIPAL AND AGENT, 1.
- Of agents to execute bond, see PRINCIPAL AND SURETY, 1.
- Of receivers, see RECEIVERS, 1.
- Of public service commission to abrogate provisions of street railroad franchise, see STREET RAILROADS, 1.

Automobiles:

- Contract with dealer for sale of, see SALES, 2, 3.

Award:

- Of property on divorce, see DIVORCE, 3.

Bankruptcy:

- Proceedings as tolling statute, see LIMITATION OF ACTIONS, 2.
1. BANKRUPTCY—CLAIMS—PAYMENT—STATUTES. Rem. Code, § 1153, providing for the payment of liens by a receiver or assignee applies only to proceedings in state courts, and not to a trustee in bankruptcy. *McDermott v. Tolt Land Co*..... 114

Banks and Banking:

1. BANKS AND BANKING—INSOLVENCY—UNLAWFUL PREFERENCE—LIABILITY—POWERS OF STATE BANK EXAMINER. The state bank examiner, in control of an insolvent bank, being the representative of the state without authority to act for the officers of the bank, has no authority,

Banks and Banking—Continued.

- by his approval, to relieve the officers and a depositor from liability for making an unlawful preference to the depositor by turning over collateral or paying the deposit in full, regardless of good or bad faith; and they are liable therefor in tort, in case of insufficiency of assets. *Kies v. Wilkinson*..... 340
2. **SAME—INSOLVENCY—ACTION TO RECOVER PREFERENCE—COMPLAINT—SUFFICIENCY.** In an action by a receiver of an insolvent bank to recover in tort from a depositor and the officers the amount of an unlawful preference made after insolvency, the complaint must allege that the assets in the hands of the receiver are insufficient to pay the creditors. *Kies v. Wilkinson*..... 340
3. **BANKS AND BANKING—OFFICERS—OFFENSES—STATUTES—CONSTRUCTION.** Rem. Code, § 3314, of the banking act, defining the offense of knowingly subscribing to or exhibiting false or fictitious papers or securities with intent to deceive any person authorized to examine the affairs of the bank, covers an officer's sworn statement of the assets made upon demand of the state bank examiner, and it is not limited to papers that are forged or spurious. *State v. Pierson*..... 318
4. **BANKS AND BANKING—OFFICERS—OFFENSES—INFORMATION—SUFFICIENCY.** An information charging a bank officer with making a false statement of the assets with intent to deceive the state bank examiner demanding the same, charges the offense of subscribing to a false statement with intent to deceive any person authorized to examine into the affairs of the bank, rather than the offense of making or publishing any false statement of the amount of the assets or liabilities of the bank, both denounced by Rem. Code, § 3314. *State v. Pierson*..... 318
5. **SAME—OFFICERS—OFFENSES—EVIDENCE—SUFFICIENCY.** A charge of knowingly subscribing to a false statement of the assets of a bank with intent to deceive the state bank examiner is supported by proof that the statement of the loans and discounts included two drafts amounting to \$5,362 which were not owned by the bank, notwithstanding the fact that there was accrued and unpaid interest due the bank and other resources not included in the statement which would equal or exceed the amount of the two drafts. *State v. Pierson*..... 318
6. **BANKS AND BANKING—GENERAL OR SPECIAL DEPOSITS—PUBLIC FUNDS.** A deposit in a bank of public funds, by a county clerk as such, constitutes a general and not a special deposit, in the absence of any statute requiring him to deposit funds in a bank. *Kies v. Wilkinson*..... 340
7. **SAME—INSOLVENCY—GENERAL DEPOSIT—PUBLIC FUNDS—PREFERENCE.** Such a general deposit is not a public or trust deposit which,

Banks and Banking—Continued.

in case of insolvency of the bank, would have any preference over other creditors; since there was no understanding that the particular money should be returned, it was not to be used for a specially designated purpose, and the deposit was not wrongful or unlawful. *Kies v. Wilkinson*..... 340

Bar:

Effect of filing and allowance of claim against estate, see EXECUTORS AND ADMINISTRATORS, 5.
Of action by former adjudication, see JUDGMENT, 6-9.

Bequests:

See WILLS.

Bias:

Change of judges for, see JUDGES.

Bill of Exceptions:

As part of record on appeal, see APPEAL AND ERROR, 6.

Bills and Notes:

Corporation note as personal obligation of officer, see CORPORATIONS, 1-3.

Bona Fide Purchaser:

Of lumber liened upon, see LOGS AND LOGGING, 1.

Bonds:

On appeal, see APPEAL AND ERROR, 1-3.
Indemnity bonds, see INDEMNITY.
As condition precedent to issuance of writ, see INJUNCTION, 3.
Sureties on bonds, see PRINCIPAL AND SURETY.

Breach:

Of contract of employment, see MASTER AND SERVANT, 8, 10.
Of warranty, see SALES, 3-6.

Briefs:

On appeal, see APPEAL AND ERROR, 15.

Brokers:

Parol evidence to vary contract of employment, see EVIDENCE, 8.
1. **BROKERS—CONTRACTS—COMMISSIONS—RELEASE—ESTOPPEL—MUTUAL MISTAKE.** Plaintiff, a broker, is not estopped to deny a release from defendant's application for a loan and agreement to pay commissions, where the release was given by a clerk to another broker

Brokers—Continued.

through a mutual mistake, and defendant's application to such other broker was made on such mutual mistake and therefore not binding on defendant; since the essential elements of an estoppel *in pais*—a benefit on the one side or injury on the other—are wanting. *Calvin Philips & Co. v. Newoc Co.*..... 234

2. **SAME—CONTRACTS—CONSTRUCTION—PERFORMANCE—REASONABLE TIME.** An agreement to pay a commission for a loan to be made "to or through" a broker, may be repudiated where the broker's sole claim of performance was through a certain principal who unreasonably delayed in furnishing the loan, and there was no allegation or proof that the broker might have furnished the loan itself or through some other principal. *Calvin Philips & Co. v. Newoc Co.* 234
3. **SAME—CONTRACTS—PERFORMANCE—ACCEPTANCE.** To recover a broker's commission for furnishing a loan, the broker must show an unqualified acceptance by its principal, and an acceptance subject to inspection is not sufficient. *Calvin Philips & Co. v. Newoc Co.*... 234
4. **SAME—CONTRACTS—PERFORMANCE—REASONABLE TIME—EVIDENCE—SUFFICIENCY.** In an action to recover a broker's commission for negotiating a loan to the defendant, required by September 1st, the evidence fails to show that plaintiff performed its contract within a reasonable time, where it appears that only a conditional acceptance of the loan had been made by plaintiff's principal, until August 29th, when notice was mailed in the east, and it is immaterial that plaintiff, on August 14th, gave defendant a self-serving statement that the loan had been accepted contrary to the fact that the acceptance was a conditional one and not binding on the principal who was to make the loan. *Calvin Philips & Co. v. Newoc Co.*..... 234

Burden of Proof:

To show insolvency of estate, in action for deceit of executrix, see **EXECUTORS AND ADMINISTRATORS, 3.**

In criminal prosecution, see **HOMICIDE, 4.**

In action for negligence of agent, see **PRINCIPAL AND AGENT, 2.**

In action to recover deposit given under sales contract, see **SALES, 3.**

Cancellation:

Of insurance policy, see **INSURANCE, 3.**

Cancellation of Instruments:

Setting aside fraudulent conveyances, see **FRAUDULENT CONVEYANCES, 1-3.**

Rescission of contracts, see **VENDOR AND PURCHASER, 3, 4.**

1. **CANCELLATION OF INSTRUMENTS—DEEDS—ACTIONS—JUDGMENT—EFFECT.** In an action by a widow individually and as executrix of her deceased husband's estate to set aside a deed of community property

Cancellation of Instruments—Continued.

- to their son, given in consideration of life support, a judgment vesting the title in her on account of breach by the son and failure of consideration, simply sets aside the conveyance to the son and does not affect the son's rights as an heir to his father's estate. *Hastings v. Hastings*..... 653

Carriers:

- Shipment of intoxicating liquor, see INTOXICATING LIQUORS.
- Regulation of liability of by Federal employers' liability act, see MASTER AND SERVANT, 1, 2.
- Employers' liability act, implied repeal, see STATUTES, 2-4.
- 1. CARRIERS—WHO ARE COMMON CARRIERS—TAXICAB COMPANIES. Owners of automobiles driven for hire at so much per hour or trip, having fixed stands for prospective customers, and transporting passengers from place to place, although without any fixed routes, schedules, or rates, and reserving the right to refuse transportation, are common carriers and so subject to regulation under Rem. Code, § 5562-37 *et seq.* *Cushing v White*..... 172
- 2. CARRIERS—STREET CAR FARE—REGULATION BY PUBLIC SERVICE COMMISSION—STATUTES. Under the public service commission law, which provides (Rem. Code, § 8626-9) that fares shall be just, fair, reasonable and sufficient, and that every common carrier shall provide "adequate and sufficient service" and (Id., § 8626-53) that the public service commission shall have power to regulate fares and service, and determine and order the same where if unjust or unreasonable or the fares or charges are insufficient to yield a reasonable compensation for the service rendered, and (Id., § 8626-25) that no street railroad company shall charge or collect more than five cents for one continuous ride within the corporate limits, the public service commission has no power to increase the fare which a street railway company may charge within city limits to more than five cents, although that sum is found insufficient to pay a reasonable return on the property devoted to the public service and provide an adequate and sufficient service; since to harmonize the various provisions of the act, it must be construed as intending to give power to regulate rates so long only as it does not exceed the limit of five cents expressly fixed by § 8626-25 of the act. *State ex rel. Tacoma R. & Power Co. v. Public Service Commission*... 601
- 3. CARRIERS—ARRIVAL OF SHIPMENT—NOTICE TO CONSIGNEE. One who consigns perishable goods to himself at a place where he does not reside and has no representative or place of business cannot complain of the failure of the carrier to notify him of the arrival of the goods. *Rosenbaum v. Northern Pac. R. Co.*..... 225
- 4. SAME—ARRIVAL OF SHIPMENT—NOTICE TO AGENT. Where a shipper of a car of apples, consigned to himself, arranged that they be

Carriers—Continued.

stopped at a place where he had no place of business and received by T., a buyer, who was to take up the bill of lading, T. was the agent of the consignor for the purpose of receiving notice of arrival, and actual notice and inspection by T. relieves the carrier from giving notice to the consignor. *Rosenbaum v. Northern Pac. R. Co.*..... 225

5. **SAME—DUTY AS WAREHOUSEMAN.** After actual notice, given to the consignor's agent for that purpose, of the arrival in good condition of a car of apples, the carrier's liability is that of a warehouseman, and is discharged by the exercise of reasonable care in protecting the fruit from loss or damage. *Rosenbaum v. Northern Pac. R. Co.*..... 225
6. **CARRIERS—JITNEY BUSES—INJURY TO PASSENGERS—ACTIONS—INSTRUCTIONS.** In a passenger's suit for injuries sustained through the concurrent negligence of the drivers of a jitney and an automobile, instructions are not erroneous as rendering the jitney owner liable regardless of whether his negligence was the proximate cause, where they clearly charged that the negligence of the driver of the jitney, or the concurrent negligence of both drivers, must have caused the collision before verdict could be rendered against appellants. *McDorman v. Dunn*..... 120
7. **SAME.** An instruction is not prejudicially erroneous in requiring of a jitney bus driver the highest degree of care, without qualification by the clause, "consistent with the practical conduct of the business," where the instruction complained of plainly referred to the definition of his duty given in another instruction containing the qualification. *McDorman v. Dunn*..... 120
8. **SAME—JITNEYS—INJURY TO PASSENGERS—NEGLIGENCE—EVIDENCE—SUFFICIENCY.** In a passenger's suit for injuries sustained through the concurrent negligence of the drivers of a jitney and an automobile, a verdict against the former is sustained, where it appears that the street was wet and slippery, the jitney was not equipped with non-skidding devices, and was being driven at an unlawful and dangerous speed, and just before the accident, it swerved and struck the automobile, and was thrown by the force of the impact a distance of 85 feet. *McDorman v. Dunn*..... 120

Causa Mortis:

See GIFTS.

Certainty:

Parol evidence to explain contract, see EVIDENCE, 12, 13.

Certificate:

Certifying statement of facts, see APPEAL AND ERROR, 10, 11.
 Certified copies, see EVIDENCE, 6.

Certiorari:

To review order adjudging public use and necessity for county road, see HIGHWAYS, 1.

Change:

Of route in establishing county road, see HIGHWAYS, 2.

Change of Judges:

For prejudice, see JUDGES.

Charge:

To jury in criminal prosecutions, see CRIMINAL LAW, 4, 5, 12, 14, 15.
To jury in civil actions, see TRIAL, 3-5.

Charities:

1. CHARITIES—TORTS—LIABILITY. If a Young Men's Christian Association is a charitable or benevolent association, it is not liable for personal injuries sustained through the negligence of its servant in running a passenger elevator. *Susmann v. Young Men's Christian Association of Seattle*..... 487
2. CHARITIES—TORTS OF SERVANTS—PLEADING—COMPLAINT. A complaint for personal injuries fails to show that a Young Men's Christian Association is a charitable and benevolent association within the rule of nonliability for the negligence of its employees, where, though its articles indicated design for charitable purposes, it is alleged that charges were made for benefits and privileges equal in amount to charges made by institutions operated for gain, and it was not shown that it had no capital stock or that all or any considerable part of its gains were applied to charity. *Susmann v. Young Men's Christian Association of Seattle*..... 487

Chattel Mortgages:

Priority of assignment for creditors over unrecorded mortgage, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 1.

1. CHATTEL MORTGAGES—VALIDITY—STOCK IN TRADE—SALES AND PROCEEDS—RIGHTS OF CREDITORS. A chattel mortgage on a general stock of merchandise is void as to creditors of the mortgagors, where the stock was left in possession of the mortgagors with power to sell in the usual course of trade without any agreement to apply any part of the proceeds to the satisfaction of the mortgage debt. *Keyes v. Sabin*..... 618
2. SAME—FAILURE TO RECORD. A chattel mortgage is void as to creditors of the mortgagors where it was not recorded within ten days after its execution, nor until after an assignment for the benefit of creditors had been made and the assignee had taken possession; since the assignment created a specific lien for the benefit of creditors; Rem. Code, §§ 3670, 3660, requiring recording within ten

Chattel Mortgages—Continued.

days after execution as against creditors and subsequent purchasers or incumbrancers in good faith. *Keyes v. Sabin*..... 618

3. CHATTEL MORTGAGES—ACKNOWLEDGMENT AND RECORDING—"CREDITORS" AND "INCUMBRANCERS"—STATUTES—CONSTRUCTION. A preferred creditor who takes a quitclaim deed in payment of its antecedent debt, with actual notice of a prior unacknowledged and unrecorded chattel mortgage unaccompanied by an affidavit of good faith, is both a creditor and incumbrancer for value and in good faith, within Rem. Code, § 3660, providing that such a chattel mortgage is void as to creditors, subsequent purchasers and incumbrancers for value and in good faith; and its title by the quitclaim is superior to the mortgage. *Embagi v. Northwestern Improvement Co.*..... 558

Cities:

See MUNICIPAL CORPORATIONS.

Claims:

Against estate of bankrupt, see BANKRUPTCY.

Against estate of decedent, see EXECUTORS AND ADMINISTRATORS.

For money, interest on, see INTEREST.

Filing claim with trustee in bankruptcy as tolling statute, see LIMITATION OF ACTIONS, 2.

Against bond of contractor on public work, see MUNICIPAL CORPORATIONS, 1-3.

Clams:

Regulating closed season for as exercise of police power, see CONSTITUTIONAL LAW, 1.

Regulating closed season for, see FISH.

Collateral Attack:

On proceedings for establishment of highway, see HIGHWAYS, 1.

Commerce:

Carriage of goods and passengers, see CARRIERS.

Application of Federal employers' liability act to carriers engaged in interstate commerce, see MASTER AND SERVANT, 1.

1. COMMERCE—WORKMEN'S COMPENSATION—INTERSTATE COMMERCE. Employees engaged in the original construction of telegraph lines are not engaged in interstate commerce, even though it be conceded that the telegraph company is engaged in interstate commerce. *State v. Postal Telegraph-Cable Co.*..... 630

Commissioners:

Establishment of county roads, see HIGHWAYS, 1, 2.

Commissions:

Of broker, see **BROKERS**.

Common Carriers:

See **CARRIERS**.

Community Property:

Cancellation of deed of to son, effect of judgment, see **CANCELLATION OF INSTRUMENTS**.

Compensation:

Of broker, see **BROKERS**.

To workman for permanent partial disability, under workmen's compensation act, see **MASTER AND SERVANT**, 7.

For services, see **MASTER AND SERVANT**, 8, 10.

Of receiver, see **RECEIVERS**, 3.

Competency:

Of evidence in civil actions, see **EVIDENCE**, 5.

Of experts as witnesses, see **EVIDENCE**, 15.

Complaint:

In criminal prosecutions, see **CRIMINAL LAW**, 1.

In civil actions, see **PLEADING**, 3, 4.

Conclusion:

Of witness, see **EVIDENCE**, 14.

Conclusiveness:

Of judgment, see **JUDGMENT**, 6-9.

Of legislative definition as to extra hazardous employment, see **MASTER AND SERVANT**, 3.

Of judgment as to permanent partial disability of injured workman, see **MASTER AND SERVANT**, 7.

Of judgment for deed to real estate sold for taxes, see **TAXATION**, 4.

Condition:

Precedent to issuance of temporary injunction, see **INJUNCTION**, 3.

Precedent to action on policy, see **INSURANCE**, 4.

Conditions:

Imposition of on granting application to vacate decree for excusable neglect, see **DIVORCE**, 2.

In insurance policies, see **INSURANCE**, 3, 4.

Consideration:

Want of consideration for corporation note, see **CORPORATIONS**, 1, 2.

Admissibility of parol evidence to show, see **EVIDENCE**, 10.

Constables:

See SHERIFFS AND CONSTABLES.

Constitutional Law:

Subjects and titles of statutes, see STATUTES, 1.

1. CONSTITUTIONAL LAW — POLICE POWER — CONSERVATION OF FOOD SUPPLY—TAKING PROPERTY WITHOUT DUE PROCESS OF LAW—CLOSED SEASON FOR CLAMS. Rem. Code, § 5150-100, making it unlawful to take clams from any of the "tide lands" on Puget Sound for the purpose of sale or canning, between the first days of April and September of each year, is a lawful exercise of the police power in promoting the general welfare by conserving and increasing the food supply; since the state, although divested of its ownership of clams on tide lands privately owned, has power to regulate the industry for the general good and restrict the owner's use and enjoyment of property, which the statute neither takes nor destroys without due process of law. *State v. Van Vlack*..... 503
2. CONSTITUTIONAL LAW — OBLIGATION OF CONTRACT — MASTER AND SERVANT—INDUSTRIAL INSURANCE. The industrial insurance act being valid as an exercise of the police power, it is not unconstitutional as impairing the obligation of preexisting contracts for the compensation of injured workmen. *State v. Postal Telegraph Cable Co.* 630

Construction:

- Of act defining offense of subscribing to false statement of assets of bank, see BANKS AND BANKING, 3.
- Of contract to pay commission for loan, see BROKERS, 2.
- Of statute relating to fares charged by street railroad companies, see CARRIERS, 2.
- Of statute relating to acknowledgment and recording of chattel mortgages, see CHATTEL MORTGAGES, 3.
- Of act regulating closed season for clams, see FISH, 1.
- Of contract for sale of timber, see LOGS AND LOGGING, 4.
- Of contract of employment, see MASTER AND SERVANT, 9.
- Of assignment by contractor of funds due from city, see MUNICIPAL CORPORATIONS, 1.
- Of act validating tax levies by cities, see MUNICIPAL CORPORATIONS, 8.
- Of partnership contract, see PARTNERSHIP, 1.
- Of bond for performance of contract, see PRINCIPAL AND SURETY, 2, 4.
- Of contract of sale, see SALES, 2.
- Of statutes, see STATUTES, 4, 5.
- Of option clause in contract to purchase land, see VENDOR AND PURCHASER, 1.
- Of agreement to extend time for payment of installments on land contract, see VENDOR AND PURCHASER, 5.
- Of will, see WILLS, 5-8.

Continuance:

In criminal prosecution, see **CRIMINAL LAW**, 3.

Contractors:

On public work, see **MUNICIPAL CORPORATIONS**, 1-3.

Sureties on bonds of, see **PRINCIPAL AND SURETY**, 2-4.

Contracts:

See **INDEMNITY; INSURANCE; PARTNERSHIP; SALES.**

Assignment, see **ASSIGNMENTS.**

For broker's commission, see **BROKERS.**

Impairing obligation, see **CONSTITUTIONAL LAW**, 2.

Of corporation, see **CORPORATIONS**, 1-3.

Parol evidence to vary or explain, see **EVIDENCE**, 8-13.

Agreements within statute of frauds, see **FRAUDS, STATUTE OF.**

Limitation of action on implied contract, see **LIMITATION OF ACTIONS**, 1.

For sale of timber, see **LOGS AND LOGGING**, 4, 5.

Of employment, see **MASTER AND SERVANT**, 8-10.

Bonds for performance of, see **PRINCIPAL AND SURETY**, 2-4.

Reformation, see **REFORMATION OF INSTRUMENTS.**

Sales of realty, see **VENDOR AND PURCHASER.**

Contradiction:

Of witness, see **WITNESSES.**

Contributory Negligence:

Submission of to jury, see **TRIAL**, 3.

Conveyances:

See **ASSIGNMENTS FOR BENEFIT OF CREDITORS; CHATTEL MORTGAGES.**

Of community property in consideration of support, see **CANCELLATION OF INSTRUMENTS.**

In fraud of creditors, see **FRAUDULENT CONVEYANCES.**

In trust, see **TRUSTS.**

Contracts to convey, see **VENDOR AND PURCHASER.**

Corporations:

See **MUNICIPAL CORPORATIONS.**

1. **CORPORATIONS—CONTRACTS—ULTRA VIRES—PROMISSORY NOTE—CONSIDERATION.** The payee who surrenders the personal note of the president of a corporation and takes in lieu the note of the corporation does so at his peril, as the act is *prima facie* unlawful and the note of the corporation without consideration. *Hoffman v. Gottstein Investment Co.*..... 428
2. **SAME—CONTRACTS—ULTRA VIRES—WANT OF CONSIDERATION—ESTOPPEL—EVIDENCE—SUFFICIENCY.** In such case, the evidence falls to

Corporations—Continued.

show consideration and the corporation is not estopped to set up the illegality of the transaction, where it appears that the payee surrendered the president's personal note without indorsement and did not intend any sale or transfer to the corporation, and it was destroyed and never carried on the books of the corporation, and not brought to the knowledge of other trustees or stockholders, and the maker regarded the corporation note as his personal obligation the same as the other. *Hoffman v. Gottstein Investment Co.*..... 428

3. **SAME.** In such a case, an unexplained indorsement of interest on the corporation note, which was either paid by the president personally or by him from funds of the corporation, is not sufficient evidence of payment and ratification by the corporation, as the president could not ratify his own act when none of the other officers ever ratified it. *Hoffman v. Gottstein Investment Co.*..... 428
4. **CORPORATIONS—FOREIGN CORPORATIONS—DISSOLUTION—WHAT LAW GOVERNS.** The laws of the state of creation govern the existence and dissolution of corporations and will be given extra-territorial effect and recognition. *Matson v. Kennecott Mines Co.*..... 12
5. **CORPORATIONS — ACTIONS AGAINST AFTER DISSOLUTION — STATUTES.** Under § 90 of the general corporation law of Nevada, continuing the life of dissolved corporations for one year for the purpose of winding up pending litigation, an action commenced against a dissolved corporation of Nevada will not be dismissed where it made its general appearance in the action within the year limited. *Matson v. Kennecott Mines Co.*..... 12

Costs:

Presumptions on appeal as to witnesses' right to fees, see **APPEAL AND ERROR**, 19.

1. **COSTS—ON APPEAL—UNNECESSARY RECORD.** Where appellant brings up an unnecessarily voluminous record, he will be allowed costs for only a reasonable portion thereof. *Colkett v. Hammond.*..... 416

Counties:

County roads, see **HIGHWAYS**.

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Jurisdiction of in establishing county roads, see **HIGHWAYS**, 1, 2.

Courts:

Review of decisions, see **APPEAL AND ERROR**.

Judicial notice, see **EVIDENCE**, 1-3.

Jurisdiction over insane persons, see **INSANE PERSONS**, 2, 3.

Mandamus to courts, see **MANDAMUS**, 1.

Prohibition to courts, see **PROHIBITION**.

Courts—Continued.

1. **COURTS—RULE OF DECISION—STARE DECISIS.** A writ of mandate compelling a county assessor to extend a tax levy upon the county rolls is not controlling under the rule of *stare decisis*, in a taxpayer's suit contesting the tax, where there was no general acquiescence of long standing by taxpayers nor any vested rights acquired under the former judgment. *Northern Pac. R. Co. v. Snohomish County* 686
2. **COURTS—APPELLATE COURTS—JURISDICTION—PROHIBITION.** The supreme court has original jurisdiction to issue a writ of prohibition to the superior court where it is proceeding in a matter without or in excess of its jurisdiction; Const., art. 4, § 4, granting original jurisdiction to the supreme court, not being limited to matters in aid of its appellate jurisdiction. *State ex rel. Murphy v. Taylor*. 148

Credibility:

- Of witnesses, instructions, see **CRIMINAL LAW**, 5.
 Of witness, see **WITNESSES**, 2, 3.

Creditors:

- See **ASSIGNMENTS FOR BENEFIT OF CREDITORS**.
 Of insolvent bank, unlawful preference, see **BANKS AND BANKING**, 1, 2, 7.
 Rights as to chattel mortgage by debtor, see **CHATTEL MORTGAGES**.
 Filing claims against estate, see **EXECUTORS AND ADMINISTRATORS**.
 Conveyances in fraud of, see **FRAUDULENT CONVEYANCES**.

Criminal Law:

- See **HOMICIDE; LARCENY**.
 Subscribing to false statement of assets of bank, by officer, see **BANKS AND BANKING**, 3-5.
 Possession of clams during closed season, see **FISH**.
 Words importing criminal offense, as slander *per se*, see **LIBEL AND SLANDER**, 1.
1. **CRIMINAL LAW—PRELIMINARY COMPLAINT—COMMITTING MAGISTRATE—POWERS OF JUDGE.** A superior court judge, sitting as a committing magistrate, has no authority, over objection, to inquire into a charge of gross misdemeanor; in view of Rem. Code, § 46, giving justices of the peace concurrent jurisdiction with superior courts of all gross misdemeanors; and Id., §§ 1925-1928, providing that, when a complaint on such an offense is made before a justice of the peace, the justice shall issue a warrant and proceed to a trial, that the accused is entitled to a trial by a jury which shall determine whether the acts of the accused can be sufficiently punished by the penalties the justice court is empowered to inflict, and that a judge or justice is empowered to issue a warrant for arrest and examina-

Criminal Law—Continued.

- tion only when the crime charged is in the exclusive jurisdiction of the superior court. *State ex rel. Murphy v. Taylor*..... 148
2. **SAME—WITHDRAWAL OF PLEA—VACATION OF JUDGMENT.** An application to withdraw a plea of guilty is addressed to the sound discretion of the court; but, in view of Rem. Code, §§ 2111, 2181, requiring such motion and motions in arrest to be made before judgment, it can only be entertained after judgment as an application to vacate the judgment; and if for irregularity or fraud, the judgment is entitled to every reasonable intendment in its support, and will be set aside only upon a clear showing and adjudication of a *prima facie* defense on the merits. *State v. Scott*..... 199
3. **CRIMINAL LAW—CONTINUANCE—ABSENCE OF WITNESSES—ABUSE OF DISCRETION.** It is error to force one accused of murder to trial within twenty-five days after filing the information, and to deny a continuance in order to secure absent nonresident witnesses, where the killing was admitted and the only defense was insanity, and it appears that the accused had only recently arrived in this state, and witnesses from North Dakota made affidavit as to material, competent and important facts bearing on the issue of insanity which they would testify to, if the case were postponed until after harvest, and reasonable probability of their attendance in such case was assured. *State v. Musselman*..... 330
4. **CRIMINAL LAW—TRIAL—INSTRUCTIONS—GRADE OR DEGREE OF OFFENSE.** In a prosecution for arson in the first degree, in setting on fire in the nighttime a building in which there were one or more human beings, it is proper to refuse to instruct as to arson in the second degree when there was no evidence thereof. *State v. Murphy* 425
5. **SAME—INSTRUCTIONS—CREDIBILITY OF WITNESSES—REQUESTS.** In a prosecution for murder, it is proper to refuse to give precautionary instructions as to the credibility to be given evidence of declarations and statements alleged to have been made by the accused and testified to by witnesses, where other instructions were given to the effect that the jury was the sole judge of the credibility of the witnesses and should consider their conduct, the reasonableness of their story, etc., and where the statements of the accused referred to, although they showed his relations with deceased and motives of jealousy or revenge, were not strictly in the nature of confessions or admissions of the accused but rather in denial or avoidance thereof. *State v. Duncan*..... 542
6. **CRIMINAL LAW—NEW TRIAL—TIME FOR APPLICATION—REOPENING JURISDICTION.** Under the statute requiring an application for a new trial in a criminal case to be made before judgment (Rem. Code, § 2181), and within two days after verdict (Id., § 402), after a mo-

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- tion for a new trial made within two days after verdict has been overruled and judgment entered, the court has no jurisdiction to grant a motion to set aside the denial of the new trial and to re-submit the case; nor would the court have jurisdiction to do so after appeal from the judgment. *State v. Duncan*..... 542
7. **SAME—JUDGMENT—MOTION TO VACATE—EVIDENCE—RECITALS.** The recitals in a judgment that the accused was fully advised of his rights, desired no counsel, voluntarily entered a plea of guilty, which was not improperly induced, and that he was sane and mentally responsible, import absolute verity as to the matters transpiring before the court, and cannot be contradicted by the affidavit of the clerk and, when supported by the evidence, warrant the refusal of a motion to vacate for irregularity and fraud. *State v. Scott*. 199
8. **CRIMINAL LAW—APPEAL—ABATEMENT BY DEATH.** A motion to abate a case, on the ground that the accused, out on bail, had disappeared under circumstances tending to show that he had committed suicide, will be overruled where the facts are so recent that it cannot be assumed, short of positive proof, that appellant is dead. *State v. Scott*..... 199
9. **CRIMINAL LAW—APPEAL—OBJECTIONS NOT RAISED BELOW—INFORMATION—DUPLICITY.** Objections to an information for duplicity cannot be raised for the first time on appeal, nor at any time after plea of not guilty, unless such plea is withdrawn. *State v. Pierson* 318
10. **CRIMINAL LAW—APPEAL—REVIEW—OBJECTION NOT MADE BELOW.** Objection to the scope of the cross-examination of the accused cannot be raised for the first time on appeal. *State v. Murphy*..... 425
11. **SAME.** The erroneous impeachment of the accused upon a collateral matter cannot be raised on appeal, in the absence of a proper objection thereto below. *State v. Murphy*..... 425
12. **CRIMINAL LAW—APPEAL—REVIEW—INVITED ERROR—INSTRUCTION ON ALIBI.** Accused in a prosecution for murder cannot complain of the giving of an instruction upon the subject of alibi, on the theory that alibi was not his defense, where he requested an instruction upon that subject and had introduced evidence to establish an alibi. *State v. Duncan*..... 542
13. **CRIMINAL LAW—APPEAL—HARMLESS ERROR—EVIDENCE.** Error cannot be assigned on the admission of testimony that was not materially different from the testimony given by the accused. *State v. Pierson* 318
14. **SAME—APPEAL—HARMLESS ERROR—INSTRUCTIONS.** Error cannot be assigned on the reading of the entire statute defining three crimes, when a subsequent instruction was given clearly defining

Criminal Law—Continued.

the crime covered in the charge and the jury could not have been misled. *State v. Pierson*..... 318

15. **SAME—HARMLESS ERROR—INSTRUCTIONS GIVEN.** Error cannot be predicated on the refusal to give a requested instruction that was fully covered in the general charge. *State v. Duncan*..... 542

Cross-Examination:

Necessity of objections to for purpose of review, see **CRIMINAL LAW**, 10.

Crossings:

Power of city to regulate speed at crossings, see **MUNICIPAL CORPORATIONS**, 5.

Custody:

Of child on divorce, see **HABEAS CORPUS**.

Damages:

Liability of keeper for injuries caused by vicious dog, see **ANIMALS**.

For fraud, see **FRAUD**, 3, 4.

For breach of contract under statute, see **FRAUDS, STATUTE OF**, 2.

For breach of contract of employment, see **MASTER AND SERVANT**, 10.

For negligence of agent, see **PRINCIPAL AND AGENT**, 2.

For breach of warranty, see **SALES**, 6.

For negligence of constable, see **SHERIFFS AND CONSTABLES**, 1.

For diversion of waters by cotenant, see **WATERS AND WATER COURSES**, 5.

1. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** A verdict for \$2,500 for injuries sustained in an automobile collision is not excessive, where plaintiff, a veterinary surgeon, 64 years of age, sustained a cut over the right eye, a broken collar bone, and partial loss of motion of the right arm, was rendered unconscious and from the date of the injury suffered great pain, loss of sleep, and ability to care for himself. *McDorman v. Dunn*..... 120
2. **DAMAGES—EXCESSIVE VERDICT.** A verdict for \$5,000 for personal injuries sustained by a boy seven or eight years of age, is not excessive where his ankle was injured, he suffered much pain and underwent a number of operations, and his leg was permanently shortened and injured. *Bruenn v. North Yakima School District No. 7* 374
3. **DAMAGES—EXCESSIVE VERDICT—PERSONAL INJURIES.** A verdict for \$2,500 for injuries sustained by a physician 78 years of age, will not be held excessive, where it appears that he suffered a dislocation of the knee cap, cuts and bruises about the head and body, and a permanent injury to the ankle and bones of the foot, causing in-

Damages—Continued.

convenience, constant care, and pain. *Rust v. Washington Tool & Hardware Co.* 552

4. **DAMAGES—PERSONAL INJURIES—SPECIAL DAMAGES—LOSS OF EARNINGS BY FARMER—PLEADING.** In an action for personal injuries sustained by a farmer operating his own lands and other lands under leases, it is not admissible, under a complaint claiming damages "to his person" in a specified sum, to permit the plaintiff to testify that his earning capacity in overseeing his farm work and leases was \$1,500 a year, and as to his losses on account of the necessity of giving up his work and leases; since the losses were not the direct, natural and necessary result of the injury, but were due to special circumstances and conditions not implied by law or recoverable unless specially alleged. *Armstrong v. Spokane International R. Co.* 525

Death:

As ground for abatement of case, see **CRIMINAL LAW**, 8.

Debt:

Limitation on public debt, see **MUNICIPAL CORPORATIONS**, 7.

Debtor and Creditor:

See **ASSIGNMENTS FOR BENEFIT OF CREDITORS; FRAUDULENT CONVEYANCES.**

Decedents:

Estates, see **EXECUTORS AND ADMINISTRATORS.**

Gifts *causa mortis*, see **GIFTS.**

Deceit:

Liability of executrix for representing estate as bankrupt, see **EXECUTORS AND ADMINISTRATORS**, 1-3.

Decision:

On appeal, see **APPEAL AND ERROR**, 27, 28.

Rule of decision, see **COURTS**, 1.

Declarations:

As evidence in civil actions, see **EVIDENCE**, 4, 5.

Denial of legislative declaration, see **PLEADING**, 1.

Deeds:

Cancellation, see **CANCELLATION OF INSTRUMENTS.**

In fraud of creditors, see **FRAUDULENT CONVEYANCES**, 1, 2, 4.

Defamation:

See **LIBEL AND SLANDER.**

Default:

Judgment by, see JUDGMENT, 1, 2.

By vendee in payment of installments, see VENDOR AND PURCHASER, 4-6.

Degrees:

Presumptions as to degree of offense, see HOMICIDE, 4.

Delay:

In filing record on appeal, see APPEAL AND ERROR, 12.

Delivery:

Of gift, see GIFTS.

Demurrer:

In pleading, see PLEADING, 5.

Denials:

In pleading, see PLEADING, 1.

Deposits:

In bank, see BANKS AND BANKING, 6, 7.

On making contract, recovery of, see SALES, 2, 3.

Description:

Of property in summons for foreclosure of tax lien, see TAXATION, 3.

Of property devised or bequeathed, see WILLS, 6.

Devises:

See WILLS.

Directing Verdict:

In civil actions, see TRIAL, 2.

Discharge:

Of insane person from custody, see INSANE PERSONS, 2, 3.

Discount:

Liability of purchaser for exchange and discount, see SALES, 1.

Discretion:

Of city officers, interference by courts, see MANDAMUS, 2.

Discretion of Court:

Review of on appeal, see APPEAL AND ERROR, 20.

Abuse of in denying continuance to secure absent witnesses, see CRIMINAL LAW, 3.

Imposing conditions on granting application to vacate decree for excusable neglect, see DIVORCE, 2.

Dismissal and Nonsuit:

- Dismissal of appeal, see **APPEAL AND ERROR**, 3, 4, 8, 12, 20.
- Effect of dismissal of action on stay bond, see **JUDGMENT**, 10.

Dissolution:

- Of foreign corporation, see **CORPORATIONS**, 4, 5.
- Of partnership, see **PARTNERSHIP**, 1.

Distrain:

- For taxes, see **TAXATION**, 2.

Ditches:

- Irrigation ditches, see **WATERS AND WATER COURSES**.

Diversion:

- Of waters, see **WATERS AND WATER COURSES**.

Division:

- Of property on divorce, see **DIVORCE**, 3.

Divorce:

- Application for modification of decree respecting custody of child, see **HABEAS CORPUS**.

1. **DIVORCE—VACATION OF JUDGMENT—GROUNDS—EXCUSABLE NEGLECT.**
A judgment for divorce cannot be vacated on the ground of excusable neglect where the evidence establishes that defendant left the state shortly before the hearing, intending not to return, and to place property in a sister state beyond the reach of the court. *Hendrix v. Hendrix*..... 535
2. **SAME—VACATION OF JUDGMENT—CONDITIONS—DISCRETION.** It is discretionary, on application for the vacation of a judgment of divorce upon the grounds of excusable neglect, to impose the condition of defendant's subjecting his property to the jurisdiction of the court and such condition is reasonable where it appears that defendant left the state without complying with orders for suit money and temporary alimony, intending not to return, and to place property in a sister state beyond reach of the court. *Hendrix v. Hendrix* 535
3. **DIVORCE—DIVISION OF PROPERTY—AWARD—FINDINGS—SUFFICIENCY.**
In an action for divorce, an award of \$5,250 from property of the defendant is not objectionable because there were no findings as to the resources of the plaintiff wife, or because the award was not warranted by the findings as to defendant's resources, where the findings showed the nonsupport of plaintiff and four minor children, and that defendant was an able-bodied man capable of earning \$135 per month as a railroad man, and was possessed of \$7,000 to \$10,000

Divorce—Continued.

worth of real and personal property; as the findings are entitled to a favorable construction in view of reasonable and legitimate inferences. *Hendrix v. Hendrix*..... 535

Documents:

As evidence in civil actions, see EVIDENCE, 6, 7.

Due Process of Law:

See CONSTITUTIONAL LAW, 1.

Duplicity:

Necessity of objections to information for, for purpose of review, see CRIMINAL LAW, 9.

Duration:

Of lien on logs, see LOGS AND LOGGING, 3.

Earning Capacity:

Damages for, see DAMAGES, 4.

Easements:

Water rights, see WATERS AND WATER COURSES.

Election:

By purchaser to exercise option in contract for sale of land, see
VENDOR AND PURCHASER, 1, 2.

Between testamentary provisions and other rights, see WILLS, 9.

Eloignement:

Of lumber, see LOGS AND LOGGING, 2.

Eminent Domain:

Limitation of action for wrongful diversion of water for public use without compensation, see LIMITATION OF ACTIONS, 1.

Employees:

See MASTER AND SERVANT.

Employers' Liability Act:

See MASTER AND SERVANT, 1, 2.

Implied repeal, see STATUTES, 2-4.

Equity:

See CANCELLATION OF INSTRUMENTS; INJUNCTION; REFORMATION OF INSTRUMENTS; TRUSTS.

Relief from judgment for fraud, see JUDGMENT, 5.

Relief from forfeiture of contract for default in payments, see
VENDOR AND PURCHASER, 6.

Establishment:

Of highways, see HIGHWAYS, 1, 2.

Of trusts, see TRUSTS.

Estates:

Decedents' estates, see EXECUTORS AND ADMINISTRATORS.

Estoppel:

To object to order extending time for filing statement of facts, see APPEAL AND ERROR, 14.

Of broker to deny release from application for loan and agreement to pay commission, see BROKERS, 1.

Of corporation to question validity of corporation note, see CORPORATIONS, 2.

To allege error, see CRIMINAL LAW, 12.

By judgment, see JUDGMENT, 6-9.

To urge waiver of forfeiture of contract by vendor, see VENDOR AND PURCHASER, 4.

Evidence:

See HOMICIDE, 1.

Incorporation in record on appeal, see APPEAL AND ERROR, 7, 9-11.

Review on appeal, see APPEAL AND ERROR, 7, 15, 21, 24-26.

Harmless error in rulings on, see APPEAL AND ERROR, 24-26; CRIMINAL LAW, 13.

Knowingly subscribing to false statement of assets of bank, see BANKS AND BANKING, 5.

Performance of contract by broker within reasonable time, see BROKERS, 4.

For personal injuries to passengers, see CARRIERS, 8.

Want of consideration for corporation note, see CORPORATIONS, 2.

Ratification of acts of corporate officer, see CORPORATIONS, 3.

Loss of earning capacity, see DAMAGES, 4.

Of fraud, sufficiency, see FRAUD, 2.

Of separate character of property conveyed to wife, see FRAUDULENT CONVEYANCES, 1.

Of oral gift of real estate to wife, see FRAUDULENT CONVEYANCES, 2.

Notice to purchaser of fraud in sale of property, see FRAUDULENT CONVEYANCES, 4.

Of gift *causa mortis*, see GIFTS.

For personal injuries on highway, see HIGHWAYS, 3.

Of mental incompetency, see INSANE PERSONS, 1.

Of cancellation of policy, see INSURANCE, 3.

Newly discovered as ground for new trial, see NEW TRIAL.

Authority of agents of surety company, see PRINCIPAL AND SURETY, 1.

Transcript of on reference, see REFERENCE.

Negligent supervision of playgrounds, see SCHOOLS AND SCHOOL DISTRICTS.

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Of promise of marriage, see **SEDUCTION**, 2.

Loss of property through negligence of constable, see **SHERIFFS AND CONSTABLES**, 2.

Objections to at trial, see **TRIAL**, 1.

Establishment of trust, see **TRUSTS**.

Attestation of will, see **WILLS**, 1.

To impeach witness, see **WITNESSES**.

1. **EVIDENCE—JUDICIAL NOTICE—NATURAL LAWS.** The courts may take judicial notice of the scientific facts and well known natural laws respecting the spawning season and propagation of clams. *State v. Van Vlack*..... 503
2. **EVIDENCE—JUDICIAL NOTICE—Y. M. C. A. CHARITABLE PURPOSES.** The courts cannot take judicial notice that an independent Young Men's Christian Association incorporated under the laws of this state is essentially a charitable and benevolent association within the rule of nonliability for negligence of its employees. *Susmann v. Young Men's Christian Association of Seattle*..... 487
3. **EVIDENCE—JUDICIAL NOTICE—JUDICIAL PROCEEDINGS.** Upon a contest in probate over claims and the distributive shares, the lower court takes judicial notice of its own records in the probate proceedings, and on appeal the supreme court may notice judicially all that the lower court may; hence a transcript of the probate proceedings is properly filed on appeal, as part of the appellant's petition below. *In re Parkes' Estate*..... 659
4. **EVIDENCE—ADMISSIBILITY—RES GESTAE—DECLARATIONS AGAINST INTEREST.** In an action for injuries sustained in an automobile collision, the statement by defendants' driver, taken down by a clerk in the police department that he had "cut the corner," is inadmissible either as part of the *res gestae* or as a declaration against interest by a party to the suit. *Singer v. Metz Co.*..... 67
5. **EVIDENCE—DECLARATIONS AGAINST INTEREST—ADMISSIBILITY.** In an action of deceit, upon an issue as to whether defendant, the executrix of an estate, had falsely represented the estate as insolvent, her report of assets to the state tax commission is competent as a declaration against interest and in rebuttal of the misrepresentations. *Kennedy v. Burr*..... 61
6. **EVIDENCE—DOCUMENTARY EVIDENCE—RECORDS.** Copies of records certified by a deputy county auditor are not inadmissible because not certified by the auditor; the act of his deputy being his act. *State ex rel. Havercamp v. Superior Court*..... 260
7. **SAME—DOCUMENTARY EVIDENCE—MAPS AND PLATS.** A plat made by a deputy county engineer, based on his own field notes, is admissible in evidence, under Rem. Code, § 3975. *State ex rel. Havercamp v. Superior Court* 260

Evidence—Continued.

8. **EVIDENCE—PAROL EVIDENCE TO VARY WRITING—ADMISSIBILITY.**
Parol evidence is admissible upon an issue as to the reasonable time for the performance of a broker's written contract to procure a loan, where the question was one of fact that could only be determined by parol evidence as to the situation of the parties and their practical construction of the contract. *Calvin Philips & Co. v. Newoc Co.* 234
9. **EVIDENCE—TO VARY WRITING—EXCHANGE OF PROPERTY—CONTEMPORANEOUS ORAL AGREEMENT.** In the absence of fraud or mistake, it is inadmissible to vary the terms of a written contract for the exchange of properties, calling for the execution of a note and mortgage as part of the consideration, by evidence of a contemporaneous oral agreement that the note and mortgage were merely given in exchange for or in lieu of another obligation which the holder of the note was obligated to pay, and which he had not done, and that the consideration failed on that account. *Rhodes v. Owens*..... 324
10. **EVIDENCE—PAROL EVIDENCE TO VARY WRITING—EXPLAINING CONSIDERATION.** Where a written contract for the sale of a quarter section of land acknowledged payment of \$2,700 in cash as part of the purchase price, it is admissible to show by parol evidence that the true consideration for the part payment was ten acres retained by the grantor and the discharge of certain liens, received as and in lieu of the \$2,700; as the same is not inconsistent with and does not vary the written contract of sale. *Roberts v. Stiltnier*..... 397
11. **EVIDENCE—PAROL EVIDENCE—EXECUTION OF CONTRACT.** Oral evidence tending to show that no contract was in fact entered into by defendant is not inadmissible as tending to vary the terms of a memorandum of sale purporting to be signed by defendant's agent, the issue being whether the agent was acting for defendant or a third person. *Kahlotus Grain & Supply Co. v. Blair*..... 645
12. **EVIDENCE—PAROL EVIDENCE—EXPLANATORY OF WRITING—UNCERTAINTY.** A written contract employing a farm laborer to work for a one-third share of the crops, increase of the live stock on the place, and profits from the chickens and eggs, the employer to furnish everything but labor, is so vague and uncertain as to admit of proof by parol explanatory of the writing that the employer agreed to furnish a certain amount of live stock, where it appears that there was no live stock or chickens on the place at the time the contract was made. *Bookhout v. Vuich*..... 511
13. **SAME—PAROL EVIDENCE TO VARY WRITING—REFORMATION.** Where a written contract is so vague and uncertain as to admit of proof of a contemporaneous oral agreement explanatory of the terms of the writing, it is not necessary to reform the writing in order to construe it accordingly. *Bookhout v. Vuich*..... 511

Evidence—Continued.

14. **EVIDENCE—CONCLUSION OF WITNESS.** An offer to show by an experienced teacher that a teeter board was not in itself a dangerous instrumentality is properly excluded as a conclusion of the witness. *Bruenn v. North Yakima School District No. 7*..... 374
15. **EVIDENCE—OPINION EVIDENCE—NONEXPERTS.** Upon an issue as to the mental condition of plaintiff, shortly after he was injured, non-expert witnesses who saw him trembling and incoherent and unable to walk, may testify that he was not in possession of his mental faculties, where they were testifying to facts and their opinions drawn from facts within their observations. *Rust v. Washington Tool & Hardware Co.* 552

Examination:

- Of person accused of crime, see **CRIMINAL LAW**, 1.
- Of insured under oath, see **INSURANCE**, 1.

Exceptions:

- Necessity for purpose of review, see **APPEAL AND ERROR**, 4.

Excessive Damages:

- See **DAMAGES**, 1-3.

Exchange:

- Liability of purchaser for exchange and discount, see **SALES**, 1.

Exchange of Property:

- Parol evidence to vary contract for, see **EVIDENCE**, 9.

Excuse:

- For noncompliance with writ, see **MANDAMUS**, 8, 9.

Excusable Neglect:

- Ground for vacation of divorce decree, see **DIVORCE**, 1, 2.

Execution:

- Of assignment, sufficiency, see **RECEIVERS**, 2.

Executors and Administrators:

1. **EXECUTORS AND ADMINISTRATORS—LIABILITY—DECEIT.** An executrix is liable for deceit if, by false representations that the estate was bankrupt, a claimant, in reliance thereon, failed to file a claim against the estate within the time limited by law. *Kennedy v. Burr* 61
2. **SAME—LIABILITY FOR DECEIT—ACTIONS—INSTRUCTIONS.** In an action against an executrix for deceit in representing the estate as bankrupt, an instruction that it was her duty to notify a claimant to file a claim against the estate, if she was negotiating for its pay-

Executors and Administrators—Continued.

- ment, while inapt, was not prejudicial in view of the issue and an actual payment made upon the claim. *Kennedy v. Burr*..... 61
3. SAME—ACTIONS—DEFENSES. In such a case, a showing that the estate was incumbered did not overcome a *prima facie* case made that the estate was solvent; the burden then being on defendants to show not only incumbrances but insolvency. *Kennedy v. Burr*. 61
4. EXECUTORS AND ADMINISTRATORS—FILING CLAIMS—NECESSITY—SECURED CREDITOR. It was not necessary for a secured creditor to file a claim against the estate, where the administrator, before the time for filing claims had expired, agreed with the claimant, who was secured by mortgage, to pay the mortgage debt out of the first proceeds of the sale of the mortgaged property, if the claimant would consent to the sale. *In re Spark's Estate*..... 462
5. EXECUTORS AND ADMINISTRATORS—CLAIMS—FILING AND ALLOWANCE—BAR—WAIVER. The filing of a claim against an estate covering certain years, is not a waiver of all items of like character for different years not included, and allowance of the first claim does not operate as a former adjudication barring a second claim, filed within the time for presenting claims against the estate. *In re Parkes' Estate* 659
6. SAME—CLAIMS—SUFFICIENCY—PLEADING. A claim against an estate for services by a relative need not state facts overcoming the presumption that they were gratuitous, since the same precision is not required as in pleading. *In re Parkes' Estate*..... 659

Exhibits:

As part of record on appeal, see APPEAL AND ERROR, 7.

Ex Parte Orders:

Allowing fees and compensation to receiver, see RECEIVERS, 3.

Expert Testimony:

In civil actions, see EVIDENCE, 15.

Express Trusts:

See TRUSTS.

Extension:

Of time for filing statement of facts, see APPEAL AND ERROR, 13, 14.

Of time for payment of installments on land contract, see VENDOR AND PURCHASER, 5, 6.

Fares:

Regulation of street car fares by public service commission, see CARRIERS, 2.

Fences:

Railroad fencing act, title and subject, see **STATUTES**, 1.

Filing:

Bond on appeal, time for, see **APPEAL AND ERROR**, 1.

Record on appeal, effect of delay, see **APPEAL AND ERROR**, 12.

Statement of facts on appeal, see **APPEAL AND ERROR**, 13, 14.

Claims against estate, see **EXECUTORS AND ADMINISTRATORS**.

Findings:

Exceptions to for purpose of review, see **APPEAL AND ERROR**, 4.

Review on appeal, see **APPEAL AND ERROR**, 22, 23.

On awarding property on divorce, see **DIVORCE**, 3.

Of public service commission, review, see **STREET RAILROADS**, 2.

Fire Department:

Mandamus to compel city council to put into effect an ordinance increasing fire department, see **MANDAMUS**, 2, 3.

Expense of maintenance as incurring debt beyond legal limitation, see **MUNICIPAL CORPORATIONS**, 7.

Fire Insurance:

See **INSURANCE**.

Fish:

Regulating closed season for clams as exercise of police power, see **CONSTITUTIONAL LAW**, 1.

1. **FISH—CLAMS—CLOSED SEASON—STATUTES—CONSTRUCTION—“TIDE LANDS.”** Rem. Code, § 5150-100, making it unlawful to take clams from any of the “tide lands” on Puget Sound for the purpose of sale or canning during the closed season, applies to all lands which in their natural state are affected by the ebb and flow of the tide, regardless of whether the title has passed from the state. *State v. Van Vlack*..... 503
2. **SAME—CLAMS—PRIVATE OWNERSHIP.** Clams, because of their fixed habitation in the soil, become the subject of private ownership when the title to clam beds passes from the state. *State v. Van Vlack* 503

Food:

Conservation of food supply as exercise of police power, see **CONSTITUTIONAL LAW**, 1.

Foreclosure:

Of logger's lien, see **LOGS AND LOGGING**, 3.

Of tax lien, see **TAXATION**, 3, 4.

Foreign Corporations:

See CORPORATIONS, 4, 5.

Foreign Laws:

Necessity of pleading, see STATUTES, 6.

Forfeiture:

Of contract for sale of land, see VENDOR AND PURCHASER, 4-6.

Former Adjudication:

See JUDGMENT, 6-9.

Forms:

Alternative writ of mandamus, sufficiency, see MANDAMUS, 4-7.

Franchise:

Authority of public service commission to abrogate provisions of, see STREET RAILROADS, 1.

Fraud:

See FRAUDULENT CONVEYANCES.

Motion to vacate judgment for fraud, see CRIMINAL LAW, 2, 7.

Of executrix in representing estate was bankrupt, see EXECUTORS AND ADMINISTRATORS, 1-3.

Vacation of judgment for, see JUDGMENT, 5.

Sales of realty, see VENDOR AND PURCHASER, 3.

1. **FRAUD—SALES—RELIANCE ON REPRESENTATIONS.** It is actionable deceit to induce the sale of a business by false representations as to the reputation and earnings of the business, and by exhibiting padded and falsified books and records misrepresenting and concealing the true condition and status of the business, since the purchasers may rely on such representations. *Stanton v. Zercher*. 383
2. **FRAUD—EVIDENCE—SUFFICIENCY.** In an action upon a promissory note given in an exchange of properties, a counterclaim for fraud in misrepresenting the water rights appurtenant to the lands received by defendants is properly disallowed, where it appears that defendants made their own personal inspection and full informed themselves through investigation and the advice of a lawyer as to the water rights appurtenant to the land. *Rhodes v. Owens*..... 324
3. **SAME—DECEIT IN SALE—GOOD WILL AND INCOME—MEASURE OF DAMAGES.** In an action by way of counterclaim for damages for false representation in the sale of an insurance business and its good will, in which the evidence showed the falsity of the representations regarding the value of the good will as well as regarding the amount of the net earnings, the measure of damages was the difference between the net value of the business to the buyer, and the net value as it was represented, including the good will, properly

Fraud—Continued.

defined as the faith of the public and the probability of the continuance of patronage, not as the business itself, but as part of the assets and personal property; and it is not error to include an instruction as to the good will, notwithstanding testimony that the consideration for the sale was based upon figures as to the commissions which the books showed would be earned. *Stanton v. Zercher* 383

4. **SAME.** In such a case, the defrauded buyer is entitled to the highest measure of damages allowable under the law and facts, not exceeding the total unpaid consideration, including the good will, which was a calculable item under the facts, although not estimated in any given sum by any witness. *Stanton v. Zercher*..... 383
5. **FRAUD—DECEIT IN SALE—ACTION FOR DAMAGES—INSTRUCTIONS.** Upon an issue as to deceit in misrepresenting the net income of an insurance business sold to the defendant, in which there was evidence of deceit by padding books and of unlawful rebating and of the bad reputation of the plaintiff as an insurance agent, instructions thereon are proper as being within the issues. *Stanton v. Zercher* 383
6. **SAME.** Upon an issue as to deceit in misrepresenting the "net income" of a business sold to defendant, in which witnesses as to the income did not always use the word "net," instructions as to the "net income" are proper, since "income" would necessarily mean "net income" and not merely gross receipts. *Stanton v. Zercher*. 383
7. **SAME.** Upon an issue as to deceit in misrepresenting the value of the good will and net earnings of an insurance business, sold to the defendant, in which there was evidence of false representations both as to the good will and earnings, from which damages were sustained, requested instructions on the theory that the value of the business was arrived at solely by determining the amount of commissions from a renewal of business on the books are properly refused. *Stanton v. Zercher*..... 383

Frauds, Statute of:

1. **FRAUDS, STATUTE OF—MEMORANDUM OF SALE—DESIGNATION OF PARTIES.** A memorandum of the sale of wheat signed by the seller, must designate the purchaser, in order to satisfy the statute of frauds. *Kahlotus Grain & Supply Co. v. Blair*..... 645
2. **FRAUDS, STATUTE OF—DAMAGES FOR BREACH OF CONTRACT UNDER STATUTE.** Where an express trust under an oral contract to will real estate cannot be established by proof, under the statute of frauds, no damages can be awarded for breach of such contract. *In re Parkes' Estate*..... 659

Fraudulent Conveyances:

1. **FRAUDULENT CONVEYANCES—TRANSACTION BETWEEN HUSBAND AND WIFE—PAROL GIFT—EVIDENCE—SUFFICIENCY.** In an action to set aside a deed from husband to wife, as fraudulent as to community creditors existing at the time of the conveyance, the evidence is insufficient to show that the property was the separate property of the wife, where the transaction can only be sustained as a ratification of a prior parol gift of the husband's community interest in real estate, taken in the wife's name after coverture and presumptively community property, and upon the faith of which credit was given by existing creditors in the belief that it was community property. *Union Savings & Trust Co. v. Manney*..... 274
2. **SAME.** In such action, where the spouses had nothing at the time of marriage, it was incumbent upon the wife to show that the property was acquired by gift; and an oral gift of real estate, void under Rem. Code, § 8745, requiring the same to be by deed, cannot be shown by the fact that real estate, acquired after coverture, was taken in the wife's name, when less than one-tenth of the purchase price was traced to the wife's separate personal property; since the same was presumptively community property, and its status when acquired remains the same until divested by deed or estoppel; and since if the attempted gift by parol was void, any subsequent attempted ratification by deed would also be void as to creditors then existing. *Union Savings & Trust Co. v. Manney*..... 274
3. **FRAUDULENT CONVEYANCES—BONA FIDE MORTGAGE FROM FRAUDULENT VENDEE—KNOWLEDGE OF FRAUD—IMPUTED KNOWLEDGE—AGENCY OF ATTORNEY.** One who, in good faith, loaned money upon the security of a chattel mortgage upon personal property, conveyed by DeB. to D. in fraud of DeB.'s creditors, is not to be imputed with the scrivener's knowledge of DeB.'s and D.'s fraudulent intentions, where it appears that the scrivener's agency for him was limited to advice as to the value of the property, and in drawing the chattel mortgage he was acting as attorney for and was paid by DeB. and D.; and especially where the scrivener in concealing the fraudulent conveyance, colluded with DeB. and D. and thereby practically destroyed any relation of agency for the lender. *Florence v. De Beaumont*. 356
4. **FRAUDULENT CONVEYANCES — KNOWLEDGE OF GRANTEE—EVIDENCE—SUFFICIENCY.** In an action to quiet title to land, conveyed in fraud of rights under plaintiff's prior contract of purchase, the evidence supports findings that the grantee knew of the fraud, where it appears that he and the grantor were very intimate friends and their relations were such that he must have known of the existence of plaintiff's prior contract, and in no event paid over \$1,250 for land worth approximately \$5,000. *Roberts v. Stiltner*..... 397

Funds:

Deposit of public funds, see **BANKS AND BANKING**, 6, 7.

Garnishment:

As excuse for noncompliance with writ, see **MANDAMUS**, 8.

General Appearance:

See **APPEARANCE**.

Gifts:

From husband to wife in fraud of creditors, see **FRAUDULENT CONVEYANCES**, 1, 2.

1. **GIFTS—CAUSA MORTIS—DELIVERY—EVIDENCE—SUFFICIENCY.** The evidence warrants the finding that a diamond ring and a diamond brooch were delivered to the defendants as gifts by the deceased at the time of her last sickness, where it appears without dispute that she had great affection for the defendants, and several times expressed the intention to make the gifts, and on a previous occasion on submitting to an operation actually made the delivery, but they were later returned, and while at the hospital on the last occasion, the defendants came to her upon a telephone request, and received possession of the jewelry in the presence of the deceased. *Wilson v. Joseph*..... 614

Good Will:

Fraud in representing value of on sale of business, see **FRAUD**, 3.

Guaranty:

See **INDEMNITY**; **PRINCIPAL AND SURETY**.

Guardian and Ward:

Guardianship of insane persons, see **INSANE PERSONS**, 1.

Habeas Corpus:

1. **HABEAS CORPUS—CUSTODY OF CHILD—DEFENSES.** Where a divorced wife has for years continuously violated the order for the custody of a child, she is not entitled to be heard upon an application for a modification of the decree of divorce, affirmed by the supreme court, as a defense to a writ of *habeas corpus* to enforce compliance with the order. *Beers v. Walker*..... 683

Harmless Error:

In civil actions, see **APPEAL AND ERROR**, 24-26.

In criminal prosecution, see **CRIMINAL LAW**, 13-15.

Highways:

1. **HIGHWAYS—ESTABLISHMENT—AUTHORITY OF COUNTY COMMISSIONERS—JURISDICTION—COLLATERAL ATTACK.** County commissioners having general jurisdiction of the establishment of county roads by

Highways—Continued.

- virtue of Rem. Code, § 5623-1 *et seq.* and having acquired jurisdiction by petition and notice as required by Id., § 5633, to establish a certain road, their jurisdiction cannot be attacked collaterally by certiorari proceedings to review an order adjudicating a "public use and necessity for appropriating lands for the road. *State ex rel. Havercamp v. Superior Court*..... 260
2. SAME — ESTABLISHMENT — CHANGE OF ROUTE. Under Rem. Code, § 5627, empowering the county engineer to survey any other route for a county road than that petitioned for, the county commissioners may, after notice and hearing thereon, adopt a change in the route petitioned for; and reference to the former terminal points is no longer jurisdictional, in view of Id., §§ 5628-2 and 5623-3, empowering the commissioners to establish any road without petition or adopt any route found most practicable. *State ex rel. Havercamp v. Superior Court*..... 260
3. HIGHWAYS—INJURIES FROM DEFECTS—DUTY TO MAINTAIN BARRIER—EVIDENCE—SUFFICIENCY. It is not negligence to fail to maintain a barrier at the side of a county road, where, having regard to the character and amount of travel, the width of the road, the extent of the slope and the length of the portion claimed to require a railing, and whether the danger was obvious, it cannot be said that the danger was unusual or that the highway was unsafe for public travel in the ordinary way. *Culley v. King County*..... 38

Holographic Wills:

See WILLS, 3.

Homicide:

1. HOMICIDE—EVIDENCE—SUFFICIENCY. The killing being admitted and there being a presumption of murder in the second degree, a verdict of murder in the first degree, supported by circumstantial evidence, is not so unsupported as to require a new trial for want of evidence, where there was no attempt by defendant to prove self-defense or other justification, or other elements reducing the offense to manslaughter or murder in the second degree. *State v. Duncan* 542
2. HOMICIDE — INSTRUCTIONS — PREMEDITATED DESIGN. Upon defining murder in the first degree, it is proper to instruct that premeditated design is a mental operation of thinking upon an act before doing it or upon an inclination before carrying it out. *State v. Duncan* 542
3. SAME. It is proper to instruct that malice aforethought or premeditated malice is the intention to unlawfully take life, meditated upon before the act, without any particular fixed time and that but a moment need be taken in the formation of the design. *State v. Duncan* 542

Homicide—Continued.

4. **SAME—PRESUMPTIONS AND BURDEN OF PROOF—DEGREES.** Upon a prosecution for murder, it is proper to instruct that, if the killing is proved beyond a reasonable doubt, the presumption of law is that it is murder in the second degree, and the burden of proving justification is upon the defendant. *State v. Duncan*..... 542

Husband and Wife:

See DIVORCE.

Conveyances between, see FRAUDULENT CONVEYANCES, 1, 2.

Impeachment:

Necessity of objections to erroneous impeachment of accused, for purpose of review, see CRIMINAL LAW, 11.

Of witness, see WITNESSES.

Implied Repeal:

Of statute, see STATUTES, 2-4.

Improvements:

Public improvements, see MUNICIPAL CORPORATIONS, 1-3.

Incompetency:

To manage business affairs as ground for appointment of guardian, see INSANE PERSONS, 1.

Indemnity:

Assignment of rights under indemnity bond, see ASSIGNMENTS.

Assignment of rights under bonds, by receiver, see RECEIVERS, 1, 2.

1. **INDEMNITY—REPLEVIN BOND—LIABILITY OVER—PERSONS NOT PARTIES OR LIABLE BY OPERATION OF LAW.** Where a sheriff wrongfully replevied property in a suit by a receiver, and under judgment on the replevin bond, there was no return of the property, which was assigned by the receiver, and the receiver's bondsman was held liable and recovered judgment against the sheriff, the sheriff cannot recover over from the receiver's assignee, to whom the replevied property had been delivered by the sheriff upon demand, such assignee, not having been a party to the former action; inasmuch as such assignee was not liable by express contract or by operation of law by reason of the fact that the sheriff had turned the property over, as his duty required; the receiver having presumably obtained value for the property when assigned, and there being no showing that assets in his hands were insufficient to pay the claim. *McKee v. Angeles Brewing Co.*..... 269
2. **INDEMNITY—ACTIONS—ACCRUAL—DATE OF LOSS.** A right of action upon an indemnity bond given to a surety upon paying over money while the property was subject to lien, did not accrue until judg-

Indemnity—Continued.

ment foreclosing the lien, and suit brought thereon within two years is in time. *Island Gun Club v. National Surety Co.*..... 185

Indictment and Information:

Charging officer with subscribing to false statement of assets of bank, see **BANKS AND BANKING**, 4.

Necessity of objections to for purpose of review, see **CRIMINAL LAW**, 9.

Industrial Insurance:

See **MASTER AND SERVANT**, 3-7.

Act as impairing obligation of preexisting contracts for compensation of injured workmen, see **CONSTITUTIONAL LAW**, 2.

Injunction:

As excuse for noncompliance with writ, see **MANDAMUS**, 9.

Enjoining diversion of water, see **WATERS AND WATER COURSES**.

1. **INJUNCTION—WHEN LIES—TO RESTRAIN TRESPASS.** Injunction lies to restrain trespass upon property of a corporation platted as a village and inclosed by fences and gates, where defendant threatened to continue his unlawful trespasses, which endangered the peace of the community and the lives of the owners. *Western Academy of Beaux Arts v. De Bit.*..... 42
2. **SAME—TO RESTRAIN TRESPASS—SOLVENCY OF DEFENDANT.** In such case it is unnecessary to allege that the defendant was insolvent. *Western Academy of Beaux Arts v. De Bit.*..... 42
3. **SAME—CONDITION PRECEDENT—BONDS.** It is error to grant a temporary injunction without bond, in view of Rem. Code, § 725, providing that no injunction or restraining order shall be granted until bond is given in such sum as the judge shall fix. *Western Academy of Beaux Arts v. De Bit.*..... 42

Insane Persons:

1. **INSANE PERSONS—GUARDIANSHIP—INCOMPETENCY—EVIDENCE—SUFFICIENCY.** It is not necessary that a person be insane or an idiot, in order to authorize the appointment of a guardian because of incompetency to manage business affairs; and it is error to deny an appointment, where it appears that a widow, possessed of considerable means, had been taken care of in several private sanitariums on account of mental incompetency, and had been committed to and paroled from the state asylum for the insane, had sold a farm worth \$45,000 to \$50,000 for less than half its value, and acted irrationally and suffered from delusions; since an improvident business transaction should be taken into consideration along with other evidence. *In re Bayer's Estate.*..... 694
2. **INSANE PERSONS—INQUISITIONS—DISCHARGE—JURISDICTION OF COURTS.** The superior court having general jurisdiction over insane

Insane Persons—Continued.

persons, has inherent jurisdiction irrespective of statute to discharge or commit an insane person, and such power is not affected by the repeal of Rem. Code, § 1671, authorizing the discharge of an insane person upon recovering his reason. *State ex rel. Martin v. Superior Court*..... 81

3. SAME—DISCHARGE—PROCEEDINGS. Where an insane person is out on parole given by a judge of the superior court that committed him to the hospital, the courts have jurisdiction to discharge him without the necessity of first applying to the superintendent of the hospital and there claiming his exemption from restraint. *State ex rel. Martin v. Superior Court*..... 81

Insanity:

See INSANE PERSONS.

Insolvency:

See BANKRUPTCY.

Assignment by debtor for benefit of creditors, see ASSIGNMENT FOR BENEFIT OF CREDITORS.

Unlawful preference to creditor after insolvency, see BANKS AND BANKING, 1, 2, 7.

Necessity of alleging insolvency of defendant, see INJUNCTION, 2.

Instructions:

In criminal prosecutions, see CRIMINAL LAW, 4, 5, 12, 14, 15; HOMICIDE, 2-4.

In civil actions, see TRIAL, 3-5.

Insurance:

Fraud in sale of insurance business, see FRAUD, 1, 3-7.

1. INSURANCE—FIRE POLICIES—EXAMINATION UNDER OATH—SIGNING. An appearance before a notary and submitting to an examination under oath is a substantial compliance with the provisions of an insurance policy requiring the insured to submit to examination under oath and subscribe the same, although the original copy of the examination was not signed. *Barbour v. St. Paul Fire & Marine Insurance Co.*..... 46
2. INSURANCE—FIRE INSURANCE—ASSIGNMENT OF LOSS—KNOWLEDGE OF AGENT—LIABILITY OF COMPANY. Where the agent who solicited and wrote the insurance witnessed the assignment of the policy after the loss, and had full knowledge of the terms and conditions of the assignment, his knowledge is imputed to the company, although the agent failed to report the assignment; and the company is liable for paying out the loss in disregard of the rights of the assignee. *Schwabacher Brothers & Co. v. Orient Insurance Co.*..... 449

Insurance—Continued.

3. **SAME—POLICY—CANCELLATION—EVIDENCE—SUFFICIENCY.** The evidence is insufficient to show the cancellation of a fire insurance policy by mutual consent where the company required that a receipt be signed before the policy was cancelled, and although the insured intended to cancel the policy, she refused to sign the receipt when tendered, and nothing further was done until after the loss. *Barbour v. St. Paul Fire & Marine Insurance Co.*..... 46
4. **SAME—ACTIONS—"SUSTAINABLE"—CONDITION PRECEDENT—COMPLIANCE WITH CONDITIONS.** A policy of insurance providing that no action shall be "sustainable" until after full compliance with all its requirements does not require full compliance before the action is commenced, but is satisfied by compliance at the time of trial. *Barbour v. St. Paul Fire & Marine Insurance Co.*..... 46

Intent:

Fraudulent, imputed knowledge of, see **FRAUDULENT CONVEYANCES**, 3.
 To commit crime, see **LARCENY**.
 To repeal former law, see **STATUTES**, 3, 4.
 Of testator, see **WILLS**, 5.

Interest:

- In action by partner for accounting, see **PARTNERSHIP**, 3.
 Effect as to credibility of witness, see **WITNESSES**, 3.
1. **INTEREST—CLAIMS FOR MONEY—IMPLIED PROMISE—LIQUIDATED AMOUNTS.** Where the amounts held by a contractor's assignee and released, on the request of the surety, for the payment of claims, under an implied promise to repay the same, if the contractor did not, were liquidated, interest is properly allowed on their recovery by the assignees. *National Surety Co. v. American Savings Bank & Trust Co.*..... 213

Interstate Commerce:

Employees engaged in, see **COMMERCE**.
 Application of Federal employers' liability act to carriers engaged in, see **MASTER AND SERVANT**, 1.
 Application of workmen's compensation act to employees engaged in, see **MASTER AND SERVANT**, 5.

Intoxicating Liquors:

1. **INTOXICATING LIQUORS—SEIZURES—SHIPMENTS—PERMITS—EXPIRATION.** A shipment of intoxicating liquor to a druggist, which did not reach this state until after the expiration of the thirty days limited in the permit, is contraband, and subject to seizure and forfeiture, under Rem. Code, § 6262-17, requiring a county auditor's permit for such shipments and providing that the permit shall be void after thirty days from the date of issue. *State v. Great Northern R. Co.* 464

Intoxicating Liquors—Continued.

2. **SAME—SEIZURES—EXPIRED PERMITS—DUTY OF CARRIERS.** The fact that the shipment was initiated prior to the expiration of the thirty days limited in the permit would not make it the duty of the railroad company to transport it to its destination after it had become contraband by lapse of time. *State v. Great Northern R. Co.*... 464

Irrigation:

See **WATERS AND WATER COURSES.**

Jitneys:

Injury to passenger through negligence of driver, see **CARRIERS, 6-8.**

Joinder:

Of parties, see **ACTION.**

Judges:

Authority of judge sitting as committing magistrate, see **CRIMINAL LAW, 1.**

Mandamus to judge, see **MANDAMUS, 1.**

Prohibition to restrain acts of, see **PROHIBITION.**

1. **JUDGES — CHANGE OF JUDGE — PREJUDICE — TIME FOR APPLICATION.** After requesting a trial judge to try a cause to a jury, it is too late to file an affidavit of prejudice and demand that the cause be assigned to another judge for trial. *State ex rel. Farmer v. Bell.*... 133

Judgment:

Review, see **APPEAL AND ERROR.**

Effect of judgment setting aside deed of community property to son, see **CANCELLATION OF INSTRUMENTS.**

Decisions of courts in general, see **COURTS.**

Vacation of, see **CRIMINAL LAW, 2, 7.**

Vacation of divorce decree, see **DIVORCE, 1, 2.**

Conclusiveness of as to "permanent partial disability" of injured employee, see **MASTER AND SERVANT, 7.**

On foreclosure of tax lien, conclusiveness, see **TAXATION, 4.**

In action adjudging rights of cotenants in irrigation ditch, see **WATERS AND WATER COURSES, 4.**

1. **JUDGMENT—DEFAULT—FAILURE TO ANSWER AMENDMENT.** The denial of a motion for default in answering a third amended complaint is proper where it was the same as the second amended complaint which defendant had already answered. *Matson v. Kennecott Mines Co.* 12
2. **JUDGMENT—DEFAULT—FAILURE TO ANSWER—JURISDICTION.** A default against a defendant is not without jurisdiction because of a subsequent amendment of the complaint, where he was served with the amended complaint and failed to answer, and appeared as a witness, with ample opportunity to defend. *Hastings v. Hastings.*... 653

Judgment—Continued.

3. **JUDGMENT—VACATION—LIMITATIONS.** Application under Rem. Code, § 303, for relief from a judgment taken through mistake, inadvertence, surprise or excusable neglect, must be made within one year from the date of the judgment. *In re Shilshole Avenue*.... 136
4. **SAME—VACATION—LIMITATIONS—PENDENCY OF APPEAL.** Where, owing to the pendency of an appeal, the period of one year within which relief might be had for mistake or excusable neglect expires before discovery of the mistake, the supreme court will, upon proper showing, grant leave to apply to the lower court for the vacation of the judgment for the causes set forth in Rem. Code, § 303; since the time of the pendency of the appeal should not be counted as part of the time limited. *In re Shilshole Avenue*..... 136
5. **JUDGMENT—VACATION—LIMITATIONS.** After the expiration of the time limited by law for the vacation or modification of judgments, the court has no power to entertain an application to correct a judgment and make it conform to the journal entry and the actual judgment ordered to be entered; the only relief for constructive fraud beyond the year being by suit in equity. *State ex rel. Northern Pac. R. Co. v. Superior Court*..... 144
6. **SAME—PARTIES CONCLUDED—PRIVIES.** One who was a privy, though not a formal party, and whose attorney represented him in all the litigation relating to the quieting of title to certain land, is bound by a judgment in one of the suits, determining that the land was the separate property of a married woman who was a defendant in the suit. *Siegley v. Nakata*..... 73
7. **JUDGMENT—BAR—MATTERS AND PARTIES CONCLUDED—PRINCIPAL AND SURETY.** A judgment in favor of a city entered upon an accounting between a contractor and the city is not conclusive upon the contractor's surety in the city's subsequent action to recover on the contractor's bond, upon an issue as to the release of the surety by material alterations, extras, and the diversion of payments in contravention of the surety's contract; as such issue was not litigated or before the court in the former action; and it is immaterial that the surety assisted the contractor in its defense of the former action. *Pasco v. Pacific Coast Casualty Co*..... 496
8. **JUDGMENT—RES JUDICATA—IDENTITY OF PARTIES.** A judgment in mandamus at the suit of the mayor of a city compelling a county tax assessor to extend a tax levy upon the county rolls, is not *res judicata* or a bar to an action by a taxpayer to cancel taxes against his property based upon the levy; since the parties are not the same, either actually, or potentially as a member of a class. *Northern Pac. R. Co. v. Snohomish County*..... 686
9. **JUDGMENT—CONCLUSIVENESS—RES JUDICATA.** The denial of an application to modify a judgment, made after the expiration of the

Judgment—Continued.

year limited for such applications, would not bar a suit in equity for relief on the ground of constructive fraud. *State ex rel. Northern Pac. R. Co. v. Superior Court*..... 144

10. JUDGMENT—PAYMENT—SUIT ON STAY BOND—EFFECT OF DISMISSAL. The dismissal of an action on a bond given to stay execution in a suit to vacate a judgment, merely releases the surety on the bond, and not the defendant independently and antecedently liable on the judgment, and does not operate as payment or prevent execution and sale under the judgment; and all that defendant can claim is that money paid for the discharge of the bond be credited on the judgment. *Siegley v. Nakata*..... 73

Judicial Notice:

In civil actions, see EVIDENCE, 1-3.

Jurisdiction:

Of supreme court to issue writ of prohibition to superior court, see COURTS, 2.
Criminal prosecutions, see CRIMINAL LAW, 1.
To grant motion to set aside denial of new trial and resubmit case, see CRIMINAL LAW, 6.
Of county commissioners to establish county road, see HIGHWAYS, 1, 2.
Over insane persons, see INSANE PERSONS, 2, 3.
To render default judgment, see JUDGMENT, 2.
Mandamus to compel court to exercise, see MANDAMUS, 1.

Jury:

Instructions in criminal prosecutions, see CRIMINAL LAW, 4, 5, 12, 14, 15.
Verdict in civil actions, see TRIAL, 2.
Instructions in civil action, see TRIAL, 3-5.

Justices of the Peace:

Jurisdiction in criminal prosecutions, see CRIMINAL LAW, 1.

Justification:

Of homicide, see HOMICIDE, 4.

Knowledge:

Imputed knowledge of fraudulent intent, see FRAUDULENT CONVEYANCES, 3.
By grantee of fraud in conveyance, see FRAUDULENT CONVEYANCES, 4.
Of agent as to assignment of loss, see INSURANCE, 2.

Landlord and Tenant:

1. **LANDLORD AND TENANT—UNLAWFUL DETAINER—NOTICE TO QUIT—NECESSITY—TENANCY FROM YEAR TO YEAR—HOLDING OVER ON AGRICULTURAL LANDS.** Under Rem. Code, § 813, authorizing an action of unlawful detainer in cases of tenancy upon agricultural lands where the tenant has held over for more than sixty days "without any demand or notice to quit by his landlord or successor in interest," any oral notice of termination of the lease and demand of possession at the expiration of the specified term, is sufficient to prevent the tenant from acquiring rights by holding over, and to authorize an action of unlawful detainer. *Smeltzer v. Webb*... 568

Larceny:

1. **LARCENY—BY FALSE REPRESENTATIONS — INTENT—STATUTES.** One who secures a loan by giving a chattel mortgage upon property that he did not own, is guilty of larceny, although he intended to make repayment, under Rem. Code, § 2601, making one guilty of larceny who, with intent to deprive the owner thereof, obtains possession of or title to any property by color or aid of any fraudulent or false representations. *State v. Wheeler*..... 293

Leases:

See **LANDLORD AND TENANT**.

Legislature:

Defining occupations as extra hazardous within workmen's compensation act, see **MASTER AND SERVANT**, 3, 4.

Levy:

Tax levies, validation of, see **MUNICIPAL CORPORATIONS**, 8, 9.

Libel and Slander:

1. **LIBEL AND SLANDER—SLANDER PER SE—WORDS IMPUTING OFFENSE—INJURY IN BUSINESS.** Charges by a life insurance company that its cash clerk had stolen money, made to the clerk's father, and statements to others to whom the clerk subsequently applied for employment that he had been careless in keeping his cash, or was short in his accounts, or that his accounts were not exactly right, thereby preventing his employment, are slanderous *per se*, unless true or privileged, as words importing to him a criminal offense involving moral turpitude for which he might be prosecuted, and as defamatory words prejudicing him in his business or profession. *Ecuyer v. New York Life Insurance Co*..... 247
2. **SAME—DEFENSE—TRUTH.** The truth of a statement that a clerk had been discharged because short in his accounts is a complete de-

Libel and Slander—Continued.

fense to a charge of slander, regardless of the question of privilege.
Ecuyer v. New York Life Insurance Co...... 247

3. **SAME—TRUTH—QUESTION FOR JURY.** In an action against a life insurance company for slander in charging plaintiff, its cash clerk, with stealing money, the truth of the charge, is not established, as a matter of law, by proof that he receipted for the money and his cash books and slips showed that he had not accounted for it, but the question is for the jury, where plaintiff denied the charge and any memory of receiving the money and his cash drawer was accessible to other clerks in the common office room, who might have taken the money and cash slips. *Ecuyer v. New York Life Insurance Co.* 247
4. **SAME—PRIVILEGE—CHARGES MADE TO PARENT.** Charges by an insurance auditor that a cash clerk of the insurance company had stolen money, made at an interview with the clerk at which his father was present by his consent, are only qualifiedly privileged, and the facts not being disputed, the question of privilege is one for the court. *Ecuyer v. New York Life Insurance Co.*..... 247
5. **SAME—PRIVILEGE—BUSINESS REFERENCE.** A communication made by the manager of an insurance company, upon a business reference, to another company contemplating the employment of a discharged employee, is one of qualified privilege, which is not exceeded when strictly confined to the facts that such employee had been discharged because short in his accounts and had been at least careless. *Ecuyer v. New York Life Insurance Co.*..... 247
6. **SAME—PRIVILEGE—QUESTION FOR JURY.** In such a case, whether the privilege of the occasion was exceeded depends on the good faith of the charges, and is for the jury, where the charge was not confined to the admitted facts that the clerk was short a small sum in his accounts, and it appeared that others in the office might have stolen the money from his cash drawer, and he persistently denied taking the money and refused to repay it; since the charges, under the circumstances, might have been made to coerce the payment. *Ecuyer v. New York Life Insurance Co.*..... 247

Licenses:

License tax for vehicles carrying passengers for hire, see MUNICIPAL CORPORATIONS, 4.

1. **LICENSES — OCCUPATION TAX — CARRIAGE FOR HIRE — PERSONS AFFECTED—UNDERTAKERS.** An undertaker, operating an automobile for carrying passengers for hire to and from the cemeteries in funerals conducted by him is also engaged in "carrying passengers for hire" notwithstanding his occupation as an undertaker and is subject to the occupation tax therefor, there being no exemptions from the license tax specified. *Spokane v. Knight*..... 656

Liens:

- Effect of proceedings in bankruptcy, see **BANKRUPTCY**.
- On logs and lumber, see **LOGS AND LOGGING**, 1-3.
- Tax lien, foreclosure, see **TAXATION**, 3, 4.

Limitation:

- On public debt, see **MUNICIPAL CORPORATIONS**, 7.

Limitation of Actions:

- Accrual of action on indemnity bond, see **INDEMNITY**, 2.
- Vacation of judgment, see **JUDGMENT**, 3-5.
- To foreclose logger's lien, see **LOGS AND LOGGING**, 3.
- For seduction under promise of marriage, see **SEDUCTION**, 3.

1. **LIMITATION OF ACTIONS—DAMAGING PROPERTY FOR PUBLIC USE—WRONGFUL DIVERSION OF WATER BY CITY—ACTION ON IMPLIED CONTRACT.** The riparian owner's continuing right to take water lawfully appropriated being a right so far incident to the land as to be a part of the land itself, a right of action against a city for wrongfully diverting the water for public purposes without making compensation is an action on an implied contract or liability, within Rem. Code, § 159, subd. 3, limiting the same to three years from the time when the right of action accrued. *Domrese v. Roslyn*..... 372
2. **LIMITATION OF ACTIONS—TOLLING STATUTE—BANKRUPTCY PROCEEDINGS.** The filing of a claim with a trustee in bankruptcy does not toll the statute of limitations relating to the foreclosure of liens, under Rem. Code, § 172, which provides for the tolling of the statute when the commencement of an action is stayed by injunction or statutory prohibition; since the bankruptcy proceedings did not prevent maintenance of the action. *McDermott v. Tolt Land Co.*... 114

Liquidated Claims:

- Interest on, see **INTEREST**.

Logs and Logging:

1. **LOGS AND LOGGING — LIEN — BONA FIDE PURCHASER OF LUMBER—LIABILITY—STATUTES.** Rem. Code, § 1177, providing that the purchaser of lumber "liened upon" within the thirty days given for the filing of labor liens, in order to be a *bona fide* owner, must pay full value and apply the purchase money to the payment of such *bona fide* claims as are entitled to liens, has no application to lumber sold by the manufacturer away from the mill and passing entirely from his control before any liens are filed; since it applies only to property "liened upon," and by Id., § 1163, the laborer's right of lien is limited to lumber while the same remains at the mill where manufactured, or in the possession and control of the manufacturer. *Douglass v. Woodbury Lumber Co.*..... 668

Logs and Logging—Continued.

2. **SAME—LIEN—PURCHASER—LIABILITY FOR ELOIGNMENT—STATUTES.**
A purchaser of lumber within the thirty days limited to laborers for the filing of liens cannot be held liable under Rem. Code, § 1181, as for an eloinment of lumber "upon which there is a lien," where he took it prior to the filing of any lien, and obtained complete possession away from the mill so that it was not subject to a lien. *Douglass v. Woodbury Lumber Co.*..... 668
3. **LOGS AND LOGGING—LIENS — DURATION — FORECLOSURE — LIMITATIONS.** Rem. Code, §§ 1152, 1138, providing that liens on logs shall not bind the property for more than eight months and that no action to enforce the same shall be commenced thereafter, limits the duration of the lien and the time for commencing suit thereon. *McDermott v. Tolt Land Co.*..... 114
4. **LOGS AND LOGGING — CONTRACT — CONSTRUCTION.** Where the purchaser of timber agreed to remove and pay for it within five years, the contract providing for monthly payments according to mill scale as it was cut, the contract gave him five years for the removal of the timber, and he was not in default so long as the stipulated payments were made. *Colvin v. Clark.*..... 100
5. **SAME — CONTRACT — PERFORMANCE.** Where the seller of timber failed on demand to furnish a right of way as agreed, required for the removal of one million feet of the timber, the buyer was entitled to a deduction therefor from the agreed price for all the timber. *Colvin v. Clark.*..... 100

Lumber:

Liens for labor in manufacture of, see LOGS AND LOGGING, 1-3.

Mandamus:

1. **MANDAMUS — TO COURTS — ERRONEOUS DISMISSAL FOR WANT OF JURISDICTION—REMEDY BY APPEAL.** Mandamus lies to compel a superior court to proceed with a case which it erroneously dismissed on the mistaken belief that it had no jurisdiction; since the judgment rests upon a disclaimer of the judicial function, and is not a judicial act which ought to be reviewed on appeal. *State ex rel. Martin v. Superior Court.*..... 81
2. **MANDAMUS—TO CITY COUNCIL — DISCRETION — EFFICIENT FIRE DEPARTMENT.** The courts will not interfere with the discretion of the city authorities in determining the necessity of increasing the fire department, except for abuse of discretion or when the abuse is so gross that reasonable minds cannot differ thereon; and the decision of the electors of a city of the first class that a double platoon system is necessary for adequate fire protection is not unreasonable on its face. *State ex rel. Taro v. Everett.*..... 561

Mandamus—Continued.

3. **MANDAMUS — PARTIES — RIGHT TO REMEDY — CITY EMPLOYEES.** A member of the fire department indirectly affected, though not a citizen or taxpayer of the city, has capacity to institute mandamus proceedings to compel the city council to put into effect an ordinance increasing the force in the fire department; inasmuch as the statutory writ of mandamus is not a prerogative writ but a civil procedure available to any person having the right, the same as the right to commence a civil action. *State ex rel. Taro v. Everett*.. 561
4. **MANDAMUS—ALTERNATIVE WRIT—FORM—SUFFICIENCY.** Rem. Code, § 1016, prescribing the substance and not any particular form for an alternative writ of mandate, is complied with where the writ gives notice that it was issued by a court of competent jurisdiction and notifies the party of the exact thing to be done, or in the alternative that he show cause at a certain time and place why he has not done it. *State ex rel. Prudential Savings & Loan Association v. Martin* 350
5. **SAME.** An objection that an alternative writ of mandate did not run in the name of the state is met by the fact that it bears the title of the court and cause, which was "State of Washington on the relation," etc. *State ex rel. Prudential Savings & Loan Association v. Martin*..... 350
6. **SAME—FORM—SEAL OF COURT.** An alternative writ of mandate cannot be objected to for want of the seal of the court, where the copy served was a certified copy bearing the seal of the court. *State ex rel. Prudential Savings & Loan Association v. Martin*..... 350
7. **SAME — FORM — SUFFICIENCY.** An alternative writ of mandate signed by one of the judges of the court, reciting that it was "Done in open court," etc., cannot be objected to as being merely an order of a particular judge and not the process of the court. *State ex rel. Prudential Savings & Loan Association v. Martin*..... 350
8. **MANDAMUS — EXCUSE FOR NONCOMPLIANCE — SUBSEQUENT GARNISHMENT.** A county auditor is not excused from complying with a writ of mandate directing the issuance and delivery of two certain warrants to the relator by the fact that, in a subsequent action, he had been garnisheed in an action against the relator and had answered that he held the warrants and could not make delivery by reason of the writ of garnishment. *State ex rel. O'Neil v. Wallace*..... 410
9. **SAME—EXCUSE FOR NONCOMPLIANCE—SUBSEQUENT INJUNCTION.** In such a case, it is no excuse for failing to comply with the writ that, in a subsequent action, the same court had issued an injunction restraining him from doing the things commanded in the writ of mandamus; since there is no jurisdiction to grant an injunction to stay proceedings on a mandamus. *State ex rel. O'Neil v. Wallace*.... 410

Mandate:

To lower court on decision on appeal, see **APPEAL AND ERROR**, 27, 33.

Maps:

As evidence in civil actions, see **EVIDENCE**, 7.

Maritime Laws:

Effect of Federal employers' liability act on, see **MASTER AND SERVANT**, 2.

Marriage:

Seduction under promise of, see **SEDUCTION**.

Master and Servant:

Liability of charitable association for torts of servant, see **CHARITIES**.

Employees engaged in interstate commerce, see **COMMERCE**.

Industrial insurance act as impairing obligation of preexisting contracts for compensation of injured workmen, see **CONSTITUTIONAL LAW**, 2.

Employers' liability act, repeal, see **STATUTES**, 2-4.

1. **MASTER AND SERVANT—EMPLOYERS' LIABILITY ACT—APPLICATION.** The Federal employers' liability act of June 11, 1906 (34 Stat. 232), was not unconstitutional as to the territory of Alaska, and applies to injuries to employees of a common carrier occurring in Alaska, although the carrier was engaged in interstate commerce. *Walsh v. Alaska Steamship Co.*..... 295
2. **MASTER AND SERVANT—EMPLOYERS' LIABILITY ACT—MARITIME LAW.** The Federal employers' liability act of June 11, 1906 (34 Stat. 232), being a valid statute regulating the liability of common carriers other than by railroad, in the District of Columbia and the territories, modifies general prior acts of Congress and the general maritime law of the United States, in so far as it confers rights and creates liabilities in its limited field inconsistent with such general acts and laws. *Walsh v. Alaska Steamship Co.*..... 295
3. **MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—EXTRA HAZARDOUS EMPLOYMENTS—LEGISLATIVE DEFINITION.** The legislature having, in Rem. Code, § 6604-3, of the industrial insurance act, defined the work of construction of telegraph and telephone plants as extra hazardous, the same is conclusive of the fact, especially since judicial notice cannot be taken to the contrary. *State v. Postal Telegraph-Cable Co.* 630
4. **SAME.** The legislature has the power to classify an occupation as extra hazardous unless the courts may take judicial notice that it is not hazardous. *State v. Postal Telegraph-Cable Co.*..... 630
5. **MASTER AND SERVANT—WORKMEN'S COMPENSATION—INTERSTATE COMMERCE—TELEGRAPH OPERATORS—STATUTES.** The industrial insur-

Master and Servant—Continued.

ance act for the compensation of workmen injured in extra hazardous employments does not apply to employees engaged in operating the system and handling interstate messages of a telegraph company, where a large per cent of the business of the company is interstate business and it is impossible to segregate or separate the time of employees engaged in interstate from those engaged in intrastate business; in view of § 6604-18 of the act, providing that the act in such a case, applies only to such persons to the extent that their mutual connection with intrastate work is clearly separable and distinguishable from interstate or foreign commerce. *State v. Postal Telegraph-Cable Co.*..... 630

6. MASTER AND SERVANT—WORKMEN'S COMPENSATION—EXACTION OF PREMIUMS—VALIDITY—"TAX." It does not follow from the fact that a telegraph company is an agent of the United States through its acceptance of the provisions of act of Congress, July 24, 1866 (U. S. Rev. Stat., §§ 5263-5269), and the building of post roads, that the industrial insurance provisions for the compensation of employees in the construction of the system within this state is either a tax upon or an attempt to regulate the business of the company; since it could not have been intended that such companies owed no obedience to state laws; and since the imposition is part of the cost of construction and not a tax upon the industry nor in the nature of a license tax. *State v. Postal Telegraph-Cable Co.*.... 630
7. MASTER AND SERVANT—INJURY TO SERVANT—COMPENSATION ACT—PERMANENT PARTIAL DISABILITY—CONCLUSIVENESS OF JUDGMENT. Under Rem. Code, § 6604-5, providing that compensation under the workmen's compensation act shall be made in a lump sum for "permanent partial disability," which is defined as the loss of certain members "or any other injury known in surgery to be permanent partial disability," the industrial insurance commission cannot, after a judgment of the superior court has determined that an injury to an employee suffering from hernia has resulted in "permanent partial disability," refuse to make compensation in a lump sum because of its promulgated rules regarding hernia, which required the injured employee to submit to an operation and take pay for loss of time only. *Kline v. Industrial Insurance Commission*..... 365
8. MASTER AND SERVANT—CONTRACT OF EMPLOYMENT—BREACH—TERMINATION OF RELATION. Where the employer of a farm laborer, to be paid by a one-third share of the crops, increase of live stock, and profits from the sale of chickens and eggs belonging to the employer, failed to furnish any live stock or chickens, the employee could rescind and recover for his services as though he had been actually dismissed from service. *Bookhout v. Vutch*..... 511
9. SAME—CONTRACT OF EMPLOYMENT—CONSTRUCTION. The relation of master and servant is created by a contract whereby plaintiff

Master and Servant—Continued.

- was employed to farm and live on defendant's premises, defendant agreeing to "pay" plaintiff one-third of the crops, increase of live stock, and profits from the sale of chickens and eggs and furnish everything except labor, the plaintiff agreeing to devote all his time to the work, and as much as possible to clearing, and to obey all orders of the defendant. *Bookhout v. Vuich*..... 511
10. SAME—CONTRACT OF EMPLOYMENT—BREACH—MEASURE OF DAMAGES. In such a case, on defendant's breach of the contract by failing to furnish live stock and chickens, and rescission by plaintiff, making proof of prospective earnings a matter of guesswork, plaintiff may recover the reasonable value of his services up to the time of the termination of the relation. *Bookhout v. Vuich*..... 511
11. MASTER AND SERVANT—INJURY TO SERVANT—DEFECTIVE APPLIANCES—PROXIMATE CAUSE—QUESTION FOR JURY. Where the death of a brakeman was caused by the sudden parting of the train, when the air hose broke and set the brakes, and a defective coupling gave way under the strain, the defective coupling was a contributing cause, and it is error to grant a nonsuit on the theory that the bursting of the air hose was the proximate cause of the accident, there being evidence tending to show that, if the train had not parted, the tender of the engine would have been a great factor of safety in preventing the accident, making the proximate cause a question for the jury. *Hubbard v. Tacoma Eastern R. Co.*..... 158
12. MASTER AND SERVANT—INJURY TO THIRD PERSON—SCOPE OF EMPLOYMENT. The owner of an automobile is not liable for injuries sustained through the negligence of her employee while driving the car for his own pleasure after working hours. *Morris v. Raymond*.. 34

Measure of Damages:

See DAMAGES, 1-3.

For fraud inducing sale of insurance business, see FRAUD, 3, 4.

For breach of contract of employment, see MASTER AND SERVANT, 10.

For negligence of agent, see PRINCIPAL AND AGENT, 2.

For breach of warranty, see SALES, 6.

Memoranda:

Required by statute of frauds, see FRAUDS, STATUTE OF, 1.

Mental Anguish:

As element of damages in action for negligence of constable, see SHERIFFS AND CONSTABLES, 1.

Misrepresentation:

See FRAUD.

Of executrix as to solvency of estate, see EXECUTORS AND ADMINISTRATORS, 1-3.

Larceny by false representations, see LARCENY.

Mistake:

- Release from contract through mutual mistake, see **BROKERS**, 1.
- Ground for reformation of instrument, see **REFORMATION OF INSTRUMENTS**.
- In payment of tax, see **TAXATION**, 1.

Money Loaned:

- Interest on, see **INTEREST**.

Money Received:

- Recovery of tax paid, see **TAXATION**, 1.
- Recovery of price paid for land, see **VENDOR AND PURCHASER**, 3, 4.

Mortgages:

- Personal property, see **CHATTEL MORTGAGES**.
- In fraud of creditors, see **FRAUDULENT CONVEYANCES**, 3.
- Reformation, see **REFORMATION OF INSTRUMENTS**.

Motions:

- Dismissal of appeal, review of order, see **APPEAL AND ERROR**, 20.
- To vacate judgment for fraud, see **CRIMINAL LAW**, 2, 7.
- New trial in criminal prosecutions, see **CRIMINAL LAW**, 6.
- To strike amended answer, see **PLEADING**, 5.
- Direction of verdict in civil actions, see **TRIAL**, 2.

Motor Vehicles:

- Occupation tax on persons engaged in carrying passengers for hire, see **LICENSES**.
- License tax for vehicles carrying passengers for hire, see **MUNICIPAL CORPORATIONS**, 4.

Municipal Corporations:

- Occupation tax for operators of automobiles engaged in carrying passengers for hire, see **LICENSES**.
 - Limitation of action against city for wrongful diversion of waters for public use, see **LIMITATION OF ACTIONS**, 1.
 - Mandamus to compel council to put ordinance into effect, see **MANDAMUS**, 2, 3.
 - Street railroads, see **STREET RAILROADS**.
1. **MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSIGNMENT BY CONTRACTOR—CONSTRUCTION—VALIDITY AS AGAINST CLAIMANTS.** A contractor's assignment to a bank of all sums to come due from the city, made for the purpose of financing the work, which provided that it shall not be valid as against claims for labor and materials, does not make the money a trust fund in the hands of the bank for the benefit of labor and material claims accruing and filed with the city after the seventy per cent of the estimates were paid to the

Municipal Corporations—Continued.

- bank as earned by the contractor, who was not in default, the intention being to authorize the city to pay to the bank what it might have paid to the contractor. *National Surety Co. v. American Savings Bank & Trust Co.*..... 213
2. SAME. Since such an assignment is not an appropriation of the fund, until actual payment, and then only *pro tanto*, it passes absolute title to each installment of the money to become due to the contractor, subject only to any claims for labor or material then existing and of which the city has notice when the payment was made; and neither the city, claimants, nor the contractor's surety could recover the money. *National Surety Co. v. American Savings Bank & Trust Co.*..... 213
3. SAME—IMPROVEMENTS—ASSIGNMENTS BY CONTRACTOR—RELEASE OF FUNDS ASSIGNED—RIGHTS OF SURETY AND ASSIGNEE. Where the absolute title to money earned by a contractor had passed and the money had been paid to the contractor's assignee, a bank that had been financing the work, and to whom the contractor was heavily indebted, the surety's written request to the bank to release certain sums in its possession for the purpose of paying claims, raises an implied promise by the surety to repay the bank, if the contractor did not, where the surety was thereby relieved from the necessity of paying the claims, and in its request expressly agreed that the bank should forfeit none of its rights by releasing the money; notwithstanding the parties were not sure of their rights under the assignment. *National Surety Co. v. American Savings Bank & Trust Co.* 213
4. MUNICIPAL CORPORATIONS—USE OF STREETS—MOTOR VEHICLES—LICENSE TAX—POWER OF CITY—STATUTES. An ordinance of the city of Spokane (No. C1590, §23) requiring a license fee of \$5 per year for all vehicles carrying passengers for hire, simply provides a license tax, and hence is not rendered void by Rem. Code, §5562-34, providing that local authorities shall have no power to pass or enforce any ordinance requiring of operators of motor vehicles any license other than an occupation license or tax. *Spokane v. Knight*..... 656
5. MUNICIPAL CORPORATIONS—STREETS—SPEED—REGULATION—STATUTES—POWER OF CITY. A city has no power by ordinance to limit the rate of speed at crossings within the business district, under Laws 1917, p. 640, §34, providing that local authorities shall have no power to pass or enforce any ordinance or regulation governing the speed of any motor vehicle except as provided in the act, provided, however, that the act shall not be construed as limiting their power to make rules and regulations governing traffic conditions not in conflict with the act; inasmuch as the act expressly prohibits it, and the proviso, if conflicting, must give way. *Seattle v. Rothweiler* 680

Municipal Corporations—Continued.

6. MUNICIPAL CORPORATIONS—STREETS—NEGLIGENCE OF DRIVER OF JITNEY—OWNERSHIP OF CAR—EVIDENCE—STATUTES—PRESUMPTION. Under Rem. Code, § 5562-13, providing that, upon the sale of any motor vehicle, delivery shall not be deemed to have been made until the vendor removes his license plates, in an action for personal injuries suffered through the negligence of the driver of a jitney, bonded by the defendant surety company and carrying the license number issued to the principal in the bond, it will be conclusively presumed that he owned the car, operated under his permit and license number, although he had executed a contract purporting to convey all title to another and voluntarily left his license number on the car pursuant to an understanding of all the parties to the sale. *Peters v. Casualty Company of America*..... 208
7. MUNICIPAL CORPORATIONS—INDEBTEDNESS—LIMITATIONS—FIRE DEPARTMENT—EXPENSES. The maintenance of an efficient force in the fire department of a city of the first class is a governmental function, to which the constitutional limitation upon municipal indebtedness has no application, which accordingly is no defense to mandamus proceedings compelling enforcement of an ordinance providing for the same. *State ex rel. Taro v. Everett*..... 561
8. MUNICIPAL CORPORATIONS—TAX LEVIES—VALIDATION—STATUTES—CONSTRUCTION, Rem. Code, § 5140-4, validating 1913 and 1914 tax levies by cities of the third class made in excess of limitations by statute, with the proviso that the act shall not apply to such cities as "did not attempt to collect such levies, or which cancelled the same," validates all excess levies mentioned except in cities where no taxpayer had paid the excess tax at the time of the passage of the validating act; this construction of "attempt to collect," when cities have no power to make the collection or to cancel the tax, being necessary to avoid an obvious absurdity. *Northern Pac. R. Co. v. Snohomish County*..... 686
9. SAME. In such a case, a mandamus suit to enforce a levy would not be within the proviso as an "attempt to collect," when the suit was not brought until after the passage of the validating act. *Northern Pac. R. Co. v. Snohomish County*..... 686

Murder:

See HOMICIDE.

Necessity:

Filing claim against estate by secured creditor, see EXECUTORS AND ADMINISTRATORS, 4.

For witnesses to written will, see WILLS, 2.

Negligence:

In carriage of passengers, see CARRIERS, 6.

Negligence—Continued.

Liability of charitable association for torts of employees, see **CHARITIES**.

Measure of damages, see **DAMAGES**, 1-3.

Cause of injury on highway, see **HIGHWAYS**, 3.

Of employee in injuring third person, see **MASTER AND SERVANT**, 12.

Cause of personal injuries in city street, see **MUNICIPAL CORPORATIONS**, 6.

Of agent in failing to take security for money loaned, see **PRINCIPAL AND AGENT**, 2.

In supervision of playgrounds, see **SCHOOLS AND SCHOOL DISTRICTS**.

Of constable in conducting search for contraband liquor, see **SHERIFFS AND CONSTABLES**.

Newly Discovered Evidence:

Ground for new trial in civil actions, see **NEW TRIAL**.

New Parties:

Bringing in new parties, see **ACTION**.

New Trial:

In criminal prosecutions, see **CRIMINAL LAW**, 6.

1. **NEW TRIAL—NEWLY DISCOVERED EVIDENCE.** A new trial for newly discovered evidence is properly overruled where the evidence could not be properly regarded as newly discovered, and would not be likely to obtain a different verdict. *Peters v. Casualty Company of America* 208

Notice:

Of appeal, see **APPEAL AND ERROR**, 2, 3.

Of application for extension of time for filing statement of facts, see **APPEAL AND ERROR**, 14.

To consignee or agent of arrival of shipment, see **CARRIERS**, 3-5.

Judicial notice, see **EVIDENCE**, 1-3.

Oral notice of termination of tenancy upon agricultural lands, see **LANDLORD AND TENANT**.

Of dissolution, see **PARTNERSHIP**, 1.

Of election to exercise option in contract for sale of land, see **VENDOR AND PURCHASER**, 1.

Nuncupative Wills:

See **WILLS**, 4.

Objections:

Necessity for purpose of review, see **CRIMINAL LAW**, 9-11.

To pleading, waiver of, see **PLEADING**, 4.

To evidence, see **TRIAL**, 1.

Obligation of Contract:

Laws impairing, see CONSTITUTIONAL LAW, 2.

Occupation Tax:

See LICENSES.

Officers:

See SHERIFFS AND CONSTABLES.

Bank officers, scope of authority, see BANKS AND BANKING, 1.

Subscribing to false statement of assets of bank, see BANKS AND BANKING, 3-5.

Prohibition to enjoin acts of state officers, see PROHIBITION.

Opening:

Judgment, see JUDGMENT, 3-5.

Opinion Evidence:

In civil actions, see EVIDENCE, 15.

Option:

In contract for sale of land, see VENDOR AND PURCHASER, 1, 2.

Oral Contract:

See FRAUDS, STATUTE OF.

Orders:

Ex parte orders on final accounting by receiver, see RECEIVERS, 3.

Ordinances:

Mandamus to compel putting into effect, see MANDAMUS, 2, 3.

Municipal ordinances, see MUNICIPAL CORPORATIONS, 4, 5, 7.

Ownership:

Of clams, see FISH, 2.

Presumption as to ownership of jitney, see MUNICIPAL CORPORATIONS, 6.

Title to irrigation ditch, see WATERS AND WATER COURSES, 1.

Parent and Child:

Habeas corpus to obtain custody of child, see HABEAS CORPUS.

Charges made to parent as qualified privilege, see LIBEL AND SLANDER, 4.

Parol Contracts:

See FRAUDS, STATUTE OF.

Parol Evidence:

In civil actions, see EVIDENCE, 8-13.

To establish trust, see TRUSTS.

Parties:

- Bringing in new parties, see ACTION.
- Obligees in bond on appeal, see APPEAL AND ERROR, 2.
- Entitled to notice of appeal, see APPEAL AND ERROR, 2, 3.
- Rights and liabilities as to costs, see COSTS.
- Error committed or invited by party, see CRIMINAL LAW, 12.
- Designation in memorandum of sale, see FRAUDS, STATUTE OF, 1.
- Liable over after judgment on replevin bond, see INDEMNITY, 1.
- Persons concluded by judgment, see JUDGMENT, 6-8.
- Affected by occupation tax, see LICENSES.
- Entitled to institute mandamus proceeding, see MANDAMUS, 3.

Partnership:

- Reference for accounting between partners, see REFERENCE.

1. PARTNERSHIP—CONTRACT—CONSTRUCTION—DISSOLUTION—NOTICE. Under a partnership agreement providing that if a certain partner should "want" to withdraw before January 1, 1917, he would lose all interest in the partnership, the expression of a desire to withdraw without affirmative action does not dissolve the partnership; and where no notice of dissolution was given prior to January 1, 1917, when suit was brought, he did not lose all interest in the partnership. *Rubens v. Rubens*..... 675
2. PARTNERSHIP—ACTION FOR ACCOUNTING—PLEADING—VARIANCE. In an action by a partner for an accounting of the profits, it is not a fatal variance for the complaint to allege a partnership in the entire business while the proof showed an interest in only a part. *Hopkins v. Craib*..... 309
3. SAME—ACTION FOR ACCOUNTING—ALLOWANCE OF INTEREST. In an action by partner for an accounting of the profits, interest should not be allowed a partner on capital invested, where interest on withdrawals of money from the partnership funds completely offset the interest that would otherwise be due. *Hopkins v. Craib*..... 309

Passengers:

- Carriage of, see CARRIERS, 1, 2, 6-8.

Payment:

- Of claims by receiver or assignee, see BANKRUPTCY.
- Effect of dismissal of action on stay bond, see JUDGMENT, 10.
- Price of goods sold, see SALES, 1.
- Taxes, see TAXATION, 1.
- Price of land sold, see VENDOR AND PURCHASER, 4-6.

Performance:

- Of contract for broker's commission, see BROKERS, 2-4.
- Of contract by seller of timber, see LOGS AND LOGGING, 5.

Permits:

For shipment of liquor, see **INTOXICATING LIQUORS**.

Personal Injuries:

From attack by vicious dog, see **ANIMALS**.
 To passenger in jitney, see **CARRIERS**, 6-8.
 Through negligent operation of passenger elevator, see **CHARITIES**.
 Damages for, see **DAMAGES**.
 To traveler on highway, see **HIGHWAYS**, 3.
 To employee, see **MASTER AND SERVANT**.
 To person on city street, see **MUNICIPAL CORPORATIONS**, 6.
 To child on playgrounds, see **SCHOOLS AND SCHOOL DISTRICTS**.

Plats:

As evidence in civil actions, see **EVIDENCE**, 7.

Plea:

In criminal prosecution, withdrawal of, see **CRIMINAL LAW**, 2.

Pleading:

See **INJUNCTION**, 2.
 Incorporation in record on appeal, see **APPEAL AND ERROR**, 5.
 Answer on merits as general appearance, see **APPEARANCE**.
 In action by receiver to recover unlawful preference by insolvent bank, see **BANKS AND BANKING**, 2.
 In action against Young Men's Christian Association for torts of servant, see **CHARITIES**, 2.
 Pleas in criminal prosecutions, withdrawal of, see **CRIMINAL LAW**, 2.
 Loss of earning capacity, see **DAMAGES**, 4.
 In action by partner for accounting, see **PARTNERSHIP**, 2.
 Foreign laws, see **STATUTES**, 6.
 Submission of contributory negligence to jury as dependent on pleading same as defense, see **TRIAL**, 3.

1. **PLEADING—DENIAL OF LEGISLATIVE DECLARATION.** In an action to collect industrial insurance premiums, a denial that an occupation is extra hazardous is of no effect where it is a denial of the legislative declaration (Rem. Code, § 6604-3) that telegraph construction work is extra hazardous. *State v. Postal Telegraph-Cable Co.*... 630
2. **PLEADING—TRIAL AMENDMENT.** Where defendants did not take advantage of leave to amend an affirmative answer, after a demurrer thereto was sustained, but went to trial on denials, it is not error to refuse leave to make a trial amendment or accept an offer of proof thereunder. *Maltbie v. Gadd*..... 483
3. **PLEADING—AMENDMENT—TO CONFORM TO PROOF.** Where a receiver's complaint in an action to recover damages from an unlawful preference failed to allege that the assets were insufficient to pay the debts, and a demurrer was erroneously overruled, upon

Pleading—Continued.

offer of proof at the trial, the complaint should be deemed amended and proofs taken upon the issue tendered. *Kies v. Wilkinson*... 340

4. **PLEADING—AMENDMENT—TO CONFORM TO PROOF—WAIVER OF OBJECTION.** A complaint for personal injuries failing to allege special damages cannot be deemed amended to conform to proof of special damages at the trial, where the evidence was duly objected to, and the error is not waived by failing to claim a surprise and ask a continuance, in the absence of offer of amendment. *Armstrong v. Spokane International R. Co.*..... 525
5. **PLEADING—ANSWER—MOTION TO STRIKE—DEMURRER.** A motion to strike an amended answer because similar to the original may be treated as a demurrer and sustained. *Maltbie v. Gadd*..... 483

Police Power:

Regulating closed season for clams as exercise of police power, see CONSTITUTIONAL LAW, 1.

Policy:

Of insurance, see INSURANCE.

Possession:

Of mortgaged property, see CHATTEL MORTGAGES, 1.

Powers:

Of state bank examiner, see BANKS AND BANKING, 1.

Of superior judge sitting as committing magistrate, see CRIMINAL LAW, 1.

Of city to impose license tax on vehicles carrying passengers for hire, see MUNICIPAL CORPORATIONS, 4.

Of city to regulate speed at crossings, see MUNICIPAL CORPORATIONS, 5.

Of public service commission, see STREET RAILROADS, 1.

Practice:

See APPEAL AND ERROR; COSTS; CRIMINAL LAW; EVIDENCE; PLEADING; TRIAL.

Prosecution of actions in general, see ACTION.

Prejudice:

Ground for reversal in civil actions, see APPEAL AND ERROR, 24-26.

Ground for reversal in criminal action, see CRIMINAL LAW, 13-15.

Of judge, see JUDGES.

Premeditation:

In commission of crime, see HOMICIDE, 2, 3.

Premiums:

Exaction of under workmen's compensation act as tax on business, see MASTER AND SERVANT, 6.

Presentment:

Of claims against estate of decedent, see EXECUTORS AND ADMINISTRATORS.

Presumptions:

On appeal, see APPEAL AND ERROR, 19.

In criminal prosecutions, see HOMICIDE, 1, 4.

As to ownership of jitney, in action for personal injuries from negligence of driver, see MUNICIPAL CORPORATIONS, 6.

Price:

Right of buyer to deduction from agreed price, on breach of contract by seller, see LOGS AND LOGGING, 5.

Principal and Agent:

See BROKERS.

Knowledge of fraud by agent as imputed to principal, see FRAUDULENT CONVEYANCES, 3.

Insurance agents, see INSURANCE, 1.

Authority of agents to execute stay bond, see PRINCIPAL AND SURETY, 1.

1. PRINCIPAL AND AGENT—DRAYMAN—SALES—ACCEPTANCE OF GOODS. A drayman, employed by telegraph by the buyer to haul hay and load it into cars, is not the agent of the buyer with authority to bind the buyer by the acceptance of hay that did not comply with the contract of purchase. *Sevier v. Hopkins*..... 404
2. PRINCIPAL AND AGENT—NEGLIGENCE OF AGENT—MEASURE OF DAMAGES—BURDEN OF PROOF. In an action by a principal against his agent for negligence in failing to take security for money loaned for plaintiff, in order to make a *prima facie* case for more than nominal damages it is not necessary to show the insolvency of the debtor; but a *prima facie* case having been made by proof of the negligence of the agent and a reasonable probability that with due care the collection could have been made, the burden is then upon the agent to show a reduction of the loss or that there was no damage. *Green v. Bouton*..... 454

Principal and Surety:

See INDEMNITY.

Service of notice of appeal on surety on cost bond, see APPEAL AND ERROR, 3.

Assignment of rights of surety company under indemnity bond, see ASSIGNMENTS.

Effect of dismissal of suit on stay bond, see JUDGMENT, 10.

Sureties on bond of contractor on public work, see MUNICIPAL CORPORATIONS, 2, 3.

Principal and Surety—Continued.

1. **PRINCIPAL AND SURETY—SURETY COMPANIES—AUTHORITY OF AGENTS—APPARENT AUTHORITY—EVIDENCE—SUFFICIENCY.** Local agents of a surety company are as a matter of law without apparent authority to execute a stay bond, where it was in excess of the express authority in their written power of attorney, no inquiry was made as to such express authority, they had no forms for the execution of bonds of that nature, and the bond was prepared by the assured's attorney wholly in typewriting, and some doubt was at first entertained as to their power to execute the bond. *Mills v. Title Guaranty & Surety Co.*..... 162
2. **PRINCIPAL AND SURETY—BOND FOR PERFORMANCE OF CONTRACT—CONSTRUCTION.** A bond given to secure the faithful performance of a contract to furnish all labor and material for an improvement, guarantees payment of a subcontractor doing work on the job for which the subcontractor had a lien, although the contract did not expressly provide for a bond to secure performance. *Island Gun Club v. National Surety Co.*..... 185
3. **SAME—LIABILITY OF SURETY—PERFORMANCE OF CONTRACT—PROTECTION AGAINST LIENS.** Where a bond insuring the performance of a contract required the surety to pay out any money which should be paid to it, "for the protection of all parties in interest," the surety is liable for the amount of the contract price which was paid to it upon a dispute arising, and which it paid to the contractor, after notice that a subcontractor had not been paid and had a claim for a lien exceeding the sum paid over. *Island Gun Club v. National Surety Co.*..... 185
4. **PRINCIPAL AND SURETY—STATUTORY BOND—CONSTRUCTION.** A contractor's bond, reciting that it is given in compliance with the statute requiring bonds for the benefit of specified persons, must be held to be intended as a statutory bond, and not an agreement making the surety a joint principal with the contractor on city work without right to the defenses of a surety. *Pasco v. Pacific Coast Casualty Co.*..... 496

Priorities:

- Of assignments, see **ASSIGNMENTS FOR BENEFIT OF CREDITORS**, 1.
- Of mortgages, see **CHATTEL MORTGAGES**, 3.

Privilege:

- From liability for slander, see **LIBEL AND SLANDER**, 4-6.

Probate:

- Of wills, see **WILLS**, 4.

Process:

- On appeal, see **APPEAL AND ERROR**, 2, 3.
- On foreclosure of tax lien, see **TAXATION**, 3.

Prohibition:

Jurisdiction of supreme court to issue writ, see COURTS, 2.

1. PROHIBITION—TO COURT—JUDGE ACTING AS MAGISTRATE. Where a judge of the superior court acts as a committing magistrate in the case of a person accused of crime, he acts as a judge in the performance of a judicial function, and hence is subject to be restrained by an original writ of prohibition from the supreme court, under Const., art. 4, § 4, authorizing an original writ of prohibition against all state officers. *State ex rel. Murphy v. Taylor*..... 148

Promise:

Of marriage, see SEDUCTION.

Proof:

Amendment to conform to, see PLEADING, 3, 4.

Property:

Property assignable, see ASSIGNMENTS.

Division of on divorce, see DIVORCE, 3.

Protection of rights of property by injunction, see INJUNCTION, 1

Sale of for taxes, see TAXATION, 2-4.

Proximate Cause:

Of accident to employee, see MASTER AND SERVANT, 11.

Public Debt:

Limitation on, see MUNICIPAL CORPORATIONS, 7.

Public Improvements:

By municipalities, see MUNICIPAL CORPORATIONS, 1-3.

Public Service Commission:

Regulation of street car fares, see CARRIERS, 2.

Regulation of street railroads, see STREET RAILROADS.

Pupils:

Injury to pupil on playground, see SCHOOLS AND SCHOOL DISTRICTS.

Question for Jury:

In action for slander, see LIBEL AND SLANDER, 3, 6.

Proximate cause of accident to employee, see MASTER AND SERVANT, 11.

Railroads:

Carriage of goods and passengers, see CARRIERS, 3-5.

As employers, see MASTER AND SERVANT, 11.

Title and subject of railroad fencing act, see STATUTES, 1.

In city street, see STREET RAILROADS.

Ratification:

Of acts of corporate officers, see CORPORATIONS, 3.

Of will, see WILLS, 5.

Receivers:

1. **RECEIVERS—AUTHORITY—ASSIGNMENTS.** General receivers of a foreign surety company have, by virtue of their office, authority to assign to persons to whom the surety company is liable the surety company's rights under an indemnity bond protecting it against the liability; the same not being the assignment of assets, but simply a matter of relieving it from the obligation. *Island Gun Club v. National Surety Co.*..... 185
2. **SAME—ASSIGNMENTS—EXECUTION.** A receivers' assignment of rights under an indemnity bond, in consideration of a release from liability for the same matter, is sufficient, although signed by their individual names, without official designation, where the body of the assignment referred to the receivers as assignors, and recitals made it plain that they intended to execute it in their capacity as receivers. *Island Gun Club v. National Surety Co.*..... 185
3. **RECEIVERS—ACCOUNTING—EX PARTE ORDERS—VALIDITY.** *Ex parte* orders, allowing fees and compensation to the receiver of an insolvent corporation and to his attorneys, and approving his final account upon tendering his resignation, entered without notice to any one but the receiver and his attorneys, are void. *Colkett v. Hammond* 416

Recitals:

In judgment, conclusiveness on motion to vacate for fraud, see CRIMINAL LAW, 7.

Records:

On appeal, see APPEAL AND ERROR, 4-14.

Of chattel mortgages, see CHATTEL MORTGAGES, 2, 3.

Expense of as costs on appeal, see COSTS.

Judicial notice of, see EVIDENCE, 3.

As evidence, see EVIDENCE, 6.

Reference:

1. **REFERENCE—REPORT—EVIDENCE—TRANSCRIPTION.** Upon a referee's report upon a partnership accounting, it is not error to refuse to require the shorthand notes to be transcribed, where the referee reported that it would cost a large sum of money, the evidence of the chief witnesses was found in the reports and schedules, and he fairly stated the evidence of other witnesses, and there was no showing that appellants offered to advance the money necessary to obtain the transcript; Rem. Code, § 375, requiring the referee to report all the evidence being mandatory only in cases where the means are provided by the complaining party. *Hopkins v. Craib* 309

Reformation of Instruments:

Necessity of reforming uncertain contract, see EVIDENCE, 13.

1. REFORMATION OF INSTRUMENTS — MISTAKE — WANT OF MUTUALITY.
Mortgages given by property owners to secure payment of lump sums agreed upon and due under the terms of regrade contracts, cannot be reformed because of the owner's ignorance of his rights under city ordinances providing for a less expensive regrade than the one contracted for, in the absence of any allegation of fraud or mutual mistake. *Kelley v. Smith*..... 475

Regulation:

Of street car fares, see CARRIERS, 2.

Of speed at city crossings, see MUNICIPAL CORPORATIONS, 5.

Of street railroads by public service commission, see STREET RAILROADS.

Release:

From application for loan and agreement to pay commission, see BROKERS, 1.

Of surety by dismissal of suit on stay bond, see JUDGMENT, 10.

Of funds assigned by contractor, rights of surety and assignee, see MUNICIPAL CORPORATIONS, 3.

Reliance:

On statement of vendor inducing sale of business, see FRAUD, 1.

Remand:

Of cause on appeal or writ of error, see APPEAL AND ERROR, 27, 28.

Removal:

Of timber under contract of sale, see LOGS AND LOGGING, 4.

Repeal:

Of statute, see STATUTES, 2-4.

Repetition:

In instructions to jury, see TRIAL, 4.

Replevin:

Parties liable over after judgment on replevin bond, see INDEMNITY, 1.

Report:

On reference, see REFERENCE.

Requests:

For instructions, see CRIMINAL LAW, 5.

Rescission:

Cancellation of written instrument, see CANCELLATION OF INSTRUMENTS.

Of contract by employee for breach, see MASTER AND SERVANT, 8, 10.

Of contract for sale of land, see VENDOR AND PURCHASER, 3, 4.

Res Gestae:

In civil actions, see EVIDENCE, 4.

Res Judicata:

See JUDGMENT, 6-9.

Retrospective Laws:

See STATUTES, 5.

Return:

Tender of as defense in action for price, see SALES, 4.

Revenue:

See TAXATION.

Reversal:

On appeal, scope and extent of relief, see APPEAL AND ERROR, 27, 28.

Review:

In civil actions, see APPEAL AND ERROR.

In criminal prosecution, see CRIMINAL LAW, 8-15.

Roads:

See HIGHWAYS.

Streets in cities, see MUNICIPAL CORPORATIONS, 4-6.

Route:

For county road, adoption of change in by county commissioners, see HIGHWAYS, 2.

Sales:

Fraud inducing sale, see FRAUD.

Requirements of statute of frauds, see FRAUDS, STATUTE OF, 1.

Of lumber, liability of purchaser for liens, see LOGS AND LOGGING, 1, 2.

Of timber, see LOGS AND LOGGING, 4, 5.

Acceptance of goods by agent, see PRINCIPAL AND AGENT, 1.

Of personal property for taxes, see TAXATION, 2.

Of realty, see VENDOR AND PURCHASER.

1. SALES — CONTRACT — PAYMENT — LIABILITY OF PURCHASER FOR EXCHANGE AND DISCOUNT. Defendant's contract with a timber brokerage concern of this state for materials to be ordered from plaintiff in Australia, the price to be paid in American money in Australia, the defendant furnishing a letter of credit to cover the price. is not

Sales—Continued.

a contract made between two parties in this state, but was a contract made between a party in this state and a party in Australia, and obligates the defendant to pay the exchange and discounts constituting the cost of making the payment in Australia; and the fixing of the price in American money was only a convenient way of stating it. *Broad v. Erickson Construction Co.*..... 51

2. **SALES—CONSTRUCTION OF CONTRACT—RIGHT TO TERRITORY—DEPOSIT.** A contract whereby a dealer was given "the right to sell" ten motor cars of a certain model in specified territory, and requiring a deposit of fifty dollars on each car when ordered, is not a contract for the sale of ten cars, although there was a prepayment of \$500 as a deposit, in the absence of any reference in the contract to, or proof of, any orders for cars. *Price v. Hornburg*..... 472
3. **SAME—DEALER'S CONTRACT—RECOVERY OF DEPOSIT—BURDEN OF PROOF.** In such a case, in an action to enforce repayment of the dealer's deposit, as provided in the contract at its expiration after the last car ordered was delivered and paid for, in which the prepayment of the \$500 deposit was admitted, the burden of proof was upon the defendant to show an order for the cars, or some valid defense entitling him to retain the deposit. *Price v. Hornburg*.. 472
4. **SALES—BREACH OF WARRANTY—DEFENSE—RETURN OF PROPERTY.** Where the buyer had waived breach of warranty of a pump, a tender of its return is no defense to an action for the balance of the purchase price. *Maltbie v. Gadd*..... 483
5. **SALES—BREACH OF WARRANTY—WAIVER.** A warranty that a pump will pump a certain quantity of water is waived where it was breached at the inception of the contract, and the greater part of the purchase price was paid thereafter, and the obligation to pay the balance was renewed four years later. *Maltbie v. Gadd*..... 483
6. **SALES—WARRANTY—BREACH—MEASURE OF DAMAGES.** Where hay to be chopped was sold under a warranty of first-class condition and the vendor caused wet hay and snow to be chopped and mixed with the good hay, whereby all was spoiled, the buyer, who had no notice of the fraud until after full payment, can recover his entire damage. *Sevier v. Hopkins*..... 404

Saving Clause:

Construction of, see STATUTES, 4.

Schools and School Districts:

Statute relating to actions against school district, see STATUTES, 5.

1. **SCHOOLS AND SCHOOL DISTRICTS—INJURY TO CHILD ON PLAY GROUNDS—NEGLIGENCE—EVIDENCE—SUFFICIENCY.** Recovery against a school district for injuries to a child playing on a teeter board on

Schools and School Districts—Continued.

the school grounds, on the ground of negligence in supervision, is sustained where there was evidence that the teeter board was removed from its original position and dangerously used in a swing, and that the teacher in supervision on the grounds either permitted such removal or failed to observe and prevent it. *Bruenn v. North Yakima School District No. 7*..... 374

Seals:

Seal of court on alternative writ of mandamus, see **MANDAMUS**, 6.

Searches and Seizures:

Under laws relating to intoxicating liquors, see **INTOXICATING LIQUORS**.
Negligence of constable in conducting search for contraband liquor, see **SHERIFFS AND CONSTABLES**.

Seduction:

1. **SEDUCTION—PROMISE OF MARRIAGE—NECESSITY.** Where seduction is alleged under promise of marriage, or the promise is required by statute, it must be shown that the necessary promise existed at the time of the seduction. *Rockwell v. Day*..... 580
2. **SAME—PROMISE OF MARRIAGE—EVIDENCE—SUFFICIENCY.** A promise to "take care" of a woman of mature years who has voluntarily submitted herself to sexual intercourse, and who has been married and knows what it means to be "taken care of" after illicit cohabitation, is not a sufficient promise of marriage to sustain an action for seduction, especially where there was no impediment to marriage, the parties lived together openly and consent was not obtained by promises which made the struggle unequal when measured by age, experience, and other attending circumstances. *Rockwell v. Day*..... 580
3. **SEDUCTION—CIVIL ACTION — ACCRUAL — LIMITATIONS — CONTINUING RELATIONS—ABANDONMENT.** A right of action for seduction under promise of marriage accrues at the time the promise is made; and granting that it would continue until the illicit relations are broken off and three years thereafter, such relations must be continuous, and if abandoned and returned to under no new promise, the statute began to run at that time, and the action must be brought within three years after such an abandonment. *Rockwell v. Day*..... 580

Separate Estate:

Of wife, see **FRAUDULENT CONVEYANCES**, 1, 2.

Service:

Notice of appeal, necessary parties, see **APPEAL AND ERROR**, 2, 3.

Services:

Recovery for by servant, see **MASTER AND SERVANT**, 8-10.

Sheriffs and Constables:

1. **SHERIFFS AND CONSTABLES — ACTION FOR NEGLIGENCE — DAMAGES — MENTAL ANGUISH.** Mental anguish and disgrace is not a proper element of damages for negligence on the part of a constable in breaking and leaving open a trunk in conducting a search for contraband liquor. *Bradston v. Shrewsbury*..... 31
2. **SAME—ACTION FOR NEGLIGENCE — EVIDENCE — SUFFICIENCY.** In an action against a constable for the loss of a brooch, through his negligence in breaking and leaving open a trunk in conducting a search for contraband liquor, the testimony of the prosecuting witness as to the loss of the brooch is insufficient to support the judgment, where it was so improbable as to be utterly incredible and was impeached by two disinterested witnesses and other circumstances. *Bradston v. Shrewsbury*..... 31

Shipment:

Of liquor, see INTOXICATING LIQUORS.

Signatures:

To examination of insured under oath, see INSURANCE, 1.
Of testator, see WILLS, 1, 2.

Slander:

See LIBEL AND SLANDER.

Speed Limit:

Power of city to regulate, see MUNICIPAL CORPORATIONS, 5.

Stare Decisis:

See COURTS, 1.

State Bank Examiner:

Authority to relieve officers and depositor from liability for unlawful preference after insolvency of bank, see BANKS AND BANKING, 1.

Statement:

Of case or facts for purpose of review, see APPEAL AND ERROR, 4, 6, 10-14.

Statutes:

Payment of claims by receiver or assignee, see BANKRUPTCY.
Construction of act defining offense of subscribing to false statement of assets of bank, see BANKS AND BANKING, 3.
Regulation of street car fares, see CARRIERS, 2.
Recording chattel mortgages, see CHATTEL MORTGAGES, 2, 3.
Laws impairing obligation of contracts, see CONSTITUTIONAL LAW, 2.
Continuing life of dissolved corporation to conclude pending litigation, see CORPORATIONS, 5.

Statutes—Continued.

Regulating closed season for clams, see **FISH**, 1.

Statute of frauds, see **FRAUDS, STATUTE OF**.

Larceny by false representations, see **LARCENY**.

Licensing of motor vehicles for hire, see **LICENSES; MUNICIPAL CORPORATIONS**, 4.

Of limitation, see **LIMITATION OF ACTIONS**.

Laborer's liens on lumber, liability of purchasers, see **LOGS AND LOGGING**, 1.

Eloignment of lumber, see **LOGS AND LOGGING**, 2.

Federal employers' liability act, see **MASTER AND SERVANT**, 1, 2.

Application of workmen's compensation act, see **MASTER AND SERVANT**, 5.

Regulating speed on city streets, see **MUNICIPAL CORPORATIONS**, 5.

Validating city tax levies, see **MUNICIPAL CORPORATIONS**, 8.

Regulation of street railroads by public service commission, see **STREET RAILROADS**, 1.

1. **STATUTES—TITLES AND SUBJECTS—RAILROADS—FENCING ACT—CONSTITUTIONALITY.** The railway fence act, Rem. Code, §§ 8731, 8732, providing that railroads shall be liable for the injury or killing of stock in any manner by reason of failing to fence the track does not embrace injuries not happening through moving trains, in view of the constitutional requirement that the subject of the act be expressed in the title, and the title of the act, which was an act compelling the fencing of railroad tracks and declaring the law of negligence with regard to stock "Injured by railway trains." *Thayer v. Snohomish Logging Co.*..... 458
2. **STATUTES—REPEAL BY IMPLICATION—TERRITORIES—EMPLOYERS' LIABILITY ACT—APPLICATION.** The Federal employers' liability act of June 11, 1906 (34 Stat. 232), relating to all common carriers, including carriers by water, and held valid as to carriers engaged in trade or commerce in the District of Columbia and the territories, was not impliedly repealed by the Federal employers' liability act of April 22, 1908 (35 Stat. 65), relating to the liability of common carriers by railroad to their employees while engaged in interstate or foreign commerce; since the prior act embraces common carriers by water while unloading in Alaska, which are not within the scope or operation of the later act. *Walsh v. Alaska Steamship Co.*.. 295
3. **SAME—IMPLIED REPEAL—INTENT.** The intent to repeal the former law by the later act is not shown by the fact that Congress promptly passed the later act upon the President's suggestion to reenact the former law in such a way as to make it constitutional; since Congress did not reenact such law in its entirety or legislate upon the entire subject-matter thereof. *Walsh v. Alaska Steamship Co.*.. 295
4. **SAME—REPEALS BY IMPLICATION—SAVING CLAUSE—CONSTRUCTION.** Section 8 of the employers' liability act of 1908 (35 Stat. 65), pro-

Statutes—Continued.

- viding that nothing in the act shall limit the liability of carriers or affect the rights of employers under pending claims under the employers' liability act of June 11, 1906 (34 Stat. 232), does not show an intent to repeal the prior act in its entirety; since such a saving clause does not destroy any rights, and is not to be confused with a saving clause in a repealing section which destroys all things not saved. *Walsh v. Alaska Steamship Co.*..... 295
5. **STATUTES—CONSTRUCTION—RETROACTIVE EFFECT.** Laws 1917, p. 332, § 1, providing that no action shall be "brought or maintained" against a school district for non-contractual acts or omissions of officers or employees relating to play grounds owned or operated by the district does not apply to an action which had gone to judgment against the school district prior to the taking effect of the law in June, 1917, notwithstanding the pendency of an appeal by the defendant at that time; since the prevailing party is not "maintaining" an action by appearing and resisting the appeal. *Bruenn v. North Yakima School District No. 7.*..... 374
6. **STATUTES—FOREIGN LAWS—PLEADING.** The pleading of § 90 of the general corporation act of Nevada was not necessary for its introduction in evidence to negative the effect of § 89 of the act, set up by the defendant to show the dissolution of the corporation before suit. *Matson v. Kennecott Mines Co.*..... 12

Street Railroads:

Regulation of fares by public service commission, see **CARRIERS, 2.**

1. **STREET RAILROADS—REGULATION BY PUBLIC SERVICE COMMISSION—FRANCHISE CONDITIONS—ABROGATION—POWER OF COMMISSION—STATUTES.** Under Rem. Code, § 8626-53 of the public service commission law, which provides that the public service commission may determine and regulate just and reasonable rates, facilities, and service where the same is unjust or unreasonable or the fares or charges insufficient to yield a reasonable compensation for the service rendered, and may fix the same by order, does not authorize the public service commission to relieve from or abrogate provisions of a street railway franchise imposed by the city prior to the adoption of the public service law, and requiring the company to pave between its tracks, contribute to the cost of bridges and pay a percentage of its gross receipts, and carry city employees free, under Rem. Code, § 7507, vesting the city with the whole of the state's police power as to the use and control of its streets; notwithstanding the commission finds that the service is inadequate and the income of the company not sufficient to pay a reasonable return on the property devoted to the public use; since the public service commission law does not expressly or by necessary implication confer power to deal with the question of franchises or to modify conditions

Title:

Acquired through consummated assignment for creditors, see **ASSIGNMENTS FOR BENEFIT OF CREDITORS**, 2.

Ownership of clams, see **FISH**, 2.

Statutes, see **STATUTES**, 1.

To irrigation ditch, see **WATERS AND WATER COURSES**, 1.

Tolling:

Statute of limitations, see **LIMITATION OF ACTIONS**, 2.

Torts:

See **FRAUD; LIBEL AND SLANDER; SEDUCTION**.

Liability of charitable association for torts of employees, see **CHARITIES**.

Measure of damages, see **DAMAGES**, 1-3.

Of employers, see **MASTER AND SERVANT**.

Of constables, see **SHERIFFS AND CONSTABLES**.

Transcripts:

Of record for purpose of review, see **APPEAL AND ERROR**, 4-14.

Of evidence on partnership accounting, see **REFERENCE**.

Trespass:

Restraining, see **INJUNCTION**, 1.

Trial:

See **NEW TRIAL**.

Exceptions or objections for purpose of review, see **APPEAL AND ERROR**, 4.

Review of errors as dependent on presentation of same by record, see **APPEAL AND ERROR**, 4-14.

Review of verdicts, see **APPEAL AND ERROR**, 21.

Review of findings, see **APPEAL AND ERROR**, 22, 23.

Review of errors as dependent on prejudicial nature of same, see **APPEAL AND ERROR**, 24-26.

Instructions as to negligence of driver of jitney, see **CARRIERS**, 6, 7.

Of criminal prosecution, see **CRIMINAL LAW**.

Instructions in action against executrix for deceit, see **EXECUTORS AND ADMINISTRATORS**, 2.

Instructions in action for fraud in sale of business, see **FRAUD**, 3, 5-7.

Trial amendments, see **PLEADING**, 2-4.

Impeachment of witness, see **WITNESSES**.

1. **TRIAL—OBJECTION TO EVIDENCE—SUFFICIENCY.** Upon the offer of a receivers' assignment in evidence, an objection to it as "incompetent, irrelevant, and immaterial," is insufficient to raise the point that the signatures of the receivers had not been proved, where the objection was overruled, "unless there is objection to the form in

Trial—Continued.

- which it was authenticated," and no further objection was made.
Island Gun Club v. National Surety Co...... 185
2. TRIAL—MOTION FOR DIRECTED VERDICT—WAIVER. Where both parties ask for a directed verdict and reserve no question of fact to be submitted to the jury, they admit that the evidence is free from conflict and waive the verdict of the jury. *Sevier v. Hopkins*.. 404
 3. TRIAL—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE—PLEADING. Contributory negligence need not be submitted to the jury where it was not pleaded as a defense. *Bruenn v. North Yakima School District No. 7*..... 374
 4. TRIAL—INSTRUCTIONS—REPETITION. Unnecessary repetition in instructions will not work a reversal, where they merely stated the law properly under varying conditions of evidence, and the repetition was not unwarranted. *Rust v. Washington Tool & Hardware Co.*..... 552
 5. TRIAL—INSTRUCTIONS—CONSIDERED AS A WHOLE. Error cannot be predicated upon an instruction which might appear to be misleading, standing alone, where the jury were very fully and properly instructed as to all the issues in other instructions. *Stanton v. Zercher* 383

Trusts:

- Requirements of statute of frauds, see FRAUDS, STATUTE OF, 2.
1. TRUSTS—EXPRESS TRUSTS—PAROL PROOF. Where an heir conveyed an interest in an estate to the deceased widow in consideration of the latter's agreement to will all the estate to him upon her death, the trust, if any, was an express trust, which cannot be established by parol where it affects real property. *In re Parkes' Estate*... 659

Truth:

- Of statement as defense to action for slander, see LIBEL AND SLANDER, 2, 3.

Undertakers:

- Liability for occupation tax in carrying passengers for hire in motor vehicles, see LICENSES.

Unlawful Detainer:

- See LANDLORD AND TENANT.

Vacation:

- See JUDGMENT, 3-5.
 Of judgment in criminal action, see CRIMINAL LAW, 2, 7.
 Decree of divorce, see DIVORCE, 1, 2.

Validation:

Of tax levies, construction of act, see MUNICIPAL CORPORATIONS, 8, 9.

Variance:

In pleading action for accounting, see PARTNERSHIP, 2.

Vendor and Purchaser:

Purchasers of property fraudulently conveyed, see FRAUDULENT CONVEYANCES.

Transfer of ownership of personal property, see SALES.

1. **VENDOR AND PURCHASER—CONTRACT—RIGHTS OF PURCHASER—OPTION AND ELECTION—CONSTRUCTION.** Under a contract for ten acres of land at the agreed price of \$2,500, entitling the purchaser, after paying one-fourth or more of the price, to a deed for a proportionate part upon ceasing payments, "except that no fractional part of an acre shall be deeded under this provision," the purchaser, after having paid for more than one-fourth of the land, was entitled to as many acres as his money would pay for; and having been in default prior to the expiration of the contract, a demand by letter for an absolute deed for the acres paid for is a sufficient notice of his election under the option. *Pratt v. Arcadia Orchards Co.* . . . 649
2. **SAME.** In such a case, the fact that the purchaser remained in possession of and cultivated the entire tract after the date of the expiration of the contract, does not amount to an election to take the entire tract or an abandonment or waiver of his rights under the option and election theretofore matured. *Pratt v. Arcadia Orchards Co.* . . . 649
3. **VENDOR AND PURCHASER—RESCISSION BY VENDEE—FRAUD—WAIVER.** Fraud in the sale of land, in that the land conveyed was not the land shown and purchased, is waived, where after knowledge of the fraud, the vendee made two payments on the contract and paid the taxes, and did not commence suit for six months. *Blake v. Merritt* . . . 56
4. **SAME—FORFEITURE OF CONTRACT—DEFENSES—ESTOPPEL.** Vendee, prosecuting an action for rescission, cannot defeat forfeiture of the contract for nonpayment of installments on the ground that the vendor had accepted payments after they were past due, as such contentions are inconsistent. *Blake v. Merritt.* . . . 56
5. **VENDOR AND PURCHASER—FORFEITURE—PAYMENTS—EXTENSION OF TIME—CONSTRUCTION.** A three-year extension of time for the payment of installments "hereinafter to become due" on a land contract given in consideration of an agreement that the vendee and another should take over the purchase of certain property and divide the profits with the vendor, cannot be relied upon to prevent forfeiture of the contract for nonpayment of installments, where (1) there was at the time the extension was made an overdue pay-

Vendor and Purchaser—Continued.

ment not included in the terms of the extension "hereinafter to become due," and (2) where there was a failure to comply with the conditions as to purchasing the other property and dividing the profits. *Edwards v. Heaton*..... 595

6. **SAME—REMEDIES OF VENDOR—FORFEITURE—RELIEF FROM—EQUITY.** In such a case, where default in payments were due to a misconstruction of the extension agreement, equity will not enforce an unconditional forfeiture of the contract at the suit of the vendor, where the remedy would be a harsh one, but will give the vendee an opportunity to pay up on the contract. *Edwards v. Heaton*.. 595

Verdict:

Review on appeal, see **APPEAL AND ERROR**, 21.

Inadequate or excessive damages, see **DAMAGES**, 1-3.

Waiver:

Of claim against cost bond and sureties, see **APPEAL AND ERROR**, 3.

Of error on appeal, see **APPEAL AND ERROR**, 17, 18.

By filing claim against estate, see **EXECUTORS AND ADMINISTRATORS**, 5.

Of objections to pleading, see **PLEADING**, 4.

Of breach of warranty, see **SALES**, 4, 5.

Of verdict of jury, see **TRIAL**, 2.

Of rights under option in contract for sale of land, see **VENDOR AND PURCHASER**, 2.

Of fraud in sale of land, see **VENDOR AND PURCHASER**, 3.

Warehousemen:

Liability of carrier as, after notice of arrival of shipment, see **CARRIERS**, 5.

Warranty:

On sale of goods, see **SALES**, 3-6.

Waters and Water Courses:

Limitation of action for wrongful diversion for public use, see **LIMITATION OF ACTIONS**, 1.

1. **WATERS AND WATER COURSES—IRRIGATION DITCHES — EASEMENTS—“OWNERSHIP.”** When the title to an irrigation ditch originates in grant or prescription to use another's land, it never rises above its source as an easement, and “ownership” of the ditch refers to ownership of the easement and not to title in fee. *Little-Wetzel Co. v. Lincoln* 435
2. **SAME—IRRIGATION DITCHES—RIGHTS OF DOMINANT ESTATE.** Where, at the time of granting an easement for an irrigation ditch, there was no contemplation of a greater servitude than the one specified, the owner of the dominant estate cannot increase the burden of the

Waters and Water Courses—Continued.

- easement by turning other waters into the ditch without the consent of the owner of the servient estate. *Little-Wetzel Co. v. Lincoln* 435
3. **SAME—IRRIGATION DITCHES—RIGHTS OF TENANTS IN COMMON.** A tenant in common of the easement of an irrigation ditch has no right to enlarge the easement right by imposing the additional burden of carrying other waters not in contemplation of the parties at the inception of the grant, and neither has the right to deposit in the ditch private waters for his exclusive use; but the fact of cotenancy in the easement gives both parties the right to possession of waters in the ditch according to their respective proportionate interests. *Little-Wetzel Co. v. Lincoln*..... 435
4. **SAME—IRRIGATION DITCHES—ACTIONS—JUDGMENT—CHANGING DIVERSION.** Upon adjudging the rights of cotenants in an irrigation ditch, the court is not justified in changing the place and mode of diversion employed for a long time, merely because it would prove convenient to one of the parties in his use of a private ditch. *Little-Wetzel Co. v. Lincoln*..... 435
5. **SAME—IRRIGATION DITCHES—DAMAGES FOR DIVERSION—RIGHTS OF COTENANTS.** The wrongful commingling of his private waters, by one of the tenants in common of a joint ditch, without placing suitable measuring devices, forfeits his right to damages for diversion of part of the water by his cotenant. *Little-Wetzel Co. v. Lincoln* 435

Wills:

1. **WILLS—ATTESTATION—EVIDENCE—SUFFICIENCY.** A will is not sufficiently attested within the requirements of Laws 1917, p. 649, § 25, requiring it to be signed by the testator in the presence of two witnesses, who shall subscribe their names in the testator's presence, where it appears that it was not signed in the presence of the witnesses, and was not signed by a witness in the scope of the testator's vision, and the name of one of the witnesses, who never saw the paper, was signed by his wife without his knowledge. *In re Jones' Estate* 123
2. **WILLS—VALIDITY—WITNESSES—NECESSITY.** A written will without witnesses is invalid, under Rem. Code, § 1320, requiring wills to be attested by two subscribing witnesses in the presence of the testator. *In re Brown's Estate*..... 314
3. **WILLS—HOLOGRAPHIC WILLS—VALIDITY.** The statutes of this state providing the kind of wills that may be executed and the manner of their execution, modifies the common law with reference to holographic wills executed without witnesses; since no provision was made for holographic wills. *In re Brown's Estate*..... 314
4. **WILLS—NUNCUPATIVE WILLS—TIME FOR PROBATE.** The probate of a nuncupative will is properly denied where no proof was offered

Wills—Continued.

- within six months after speaking the words, as expressly required by Rem. Code, § 1331. *In re Brown's Estate*..... 314
5. **WILLS—CONSTRUCTION.** The testator's intention must be gathered from the language of the will, construing all the provisions together, omitted words may be supplied, and the will liberally construed to effectuate the testator's intention and, when possible, to sustain the right to dispose of one's property by will. *In re Peters' Estate* 572
6. **WILLS—CONSTRUCTION — LANDS INTENDED — SUPPLIED DESCRIPTION.** Where a testator only owned the southwest quarter of a section and intended to devise all of it to different persons, but only properly described the southeast and southwest quarters of the tract, a devise to John Nuhse of "40 acres lying between my northeast corner and the south line of John Nuhse property" (which was testator's north line) will be construed as referring to the "northeast corner" of the testator's home place, which was his southeast quarter, and as devising the northeast quarter of the southwest quarter of the section. *In re Peters' Estate*..... 572
7. **SAME.** In such case, a further devise to the same devisee of "also all property I own on the east side of the N. W. $\frac{1}{4}$ of sec. 33," will be held to refer to all the property on the "east side" of a county road running diagonally through the northwest quarter of the southwest quarter of the section. *In re Peters' Estate*..... 572
8. **SAME.** In such case, a further devise to another, to whom the adjoining southwest quarter of the southwest quarter had been devised of "also all left of the N. W. $\frac{1}{4}$ of the same section," will be held to devise all left of the northwest quarter of the southwest quarter of the section. *In re Peters' Estate*..... 572
9. **WILLS—ELECTION—RATIFICATION OF WILL.** One who takes specific devises under a will makes an election and cannot defeat collateral devises to others passing certain properties in fee or charge them with a trust, on the ground that the testatrix held it in trust for him under an agreement to will him all her property; and by offering the will as a valid testamentary disposition so far as it passes property to him, he ratifies it in its entirety. *In re Parkes' Estate* 659

Withdrawal:

Of plea of guilty, see **CRIMINAL LAW**, 2.

Witnesses:

Entitled to witness fees, presumptions, see **APPEAL AND ERROR**, 19.
 Absence ground for continuance, see **CRIMINAL LAW**, 3.
 Instructions as to credibility of, see **CRIMINAL LAW**, 5.
 Objections to erroneous impeachment of accused, for purpose of review, see **CRIMINAL LAW**, 11.

Witnesses—Continued.

Conclusion of witness, see **EVIDENCE**, 14.

Experts, see **EVIDENCE**, 15.

To written will, see **WILLS**, 2.

1. **WITNESSES—IMPEACHMENT.** Where a passenger in an automobile testified that the driver did not admit that he "cut the corner," the driver's statement that he had done so, taken down by a clerk in the police department, is inadmissible to impeach the witness; since a witness cannot be impeached by statements of others for which he was not responsible, and because it related to a collateral matter. *Singer v. Metz Co.*..... 67
2. **WITNESSES—IMPEACHMENT—EFFECT.** The impeachment of a witness by his testimony given in the police court affects the weight and credibility, and not the competency, of the evidence. *McDorman v. Dunn.*..... 120
3. **WITNESSES—IMPEACHMENT—INTEREST—AGENT OF INDEMNITY COMPANY.** Upon an issue as to plaintiff's mental condition when he signed a release of damages and an affidavit of exoneration, evidence is admissible, as affecting his credibility, that the witness who procured the release and affidavit was agent of the insurance company writing the liability policy. *Rust v. Washington Tool & Hardware Co.*..... 552

Workmen's Compensation Act:

See **MASTER AND SERVANT**, 3-7.

Employment within scope of act, see **COMMERCE**.

As impairing obligation of preexisting contracts for compensation of injured workman, see **CONSTITUTIONAL LAW**, 2.

Writings:

Parol evidence to vary writings, see **EVIDENCE**, 8-13.

Requirements of statute of frauds, see **FRAUDS, STATUTE OF**, 1.

Writs:

See **HABEAS CORPUS**; **INJUNCTION**; **MANDAMUS**; **PROHIBITION**.

Ex 74C
2/1/19

